United States Court of Appeals

for the Second Circuit

APPENDIX

B/S

ORIGINAL

75-1333

To be argued by
HERBERT S. KASSNER

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1333

UNITED STATES OF AMERICA,
Appellee,

against

MARTIN J. HODAS, *et al.*,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR THE APPELLANT

KASSNER & DETSKY, P.C.
Attorneys for Appellant
122 East 42nd Street
New York, New York 10017

HERBERT S. KASSNER
of Counsel

UNITED STATES COURT OF APPEALS
FILED
NOV 6 1975
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SECOND CIRCUIT

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I N D E X

	Page
Docket Entries	1a
Indictment	4a
Opinion	9a
Extracts of Testimony	23a

Witness Index

Name	Direct	Cross	Redirect	Recross
Donald Gray	25a	52a	139a	148a
John Jacobs	117a	166a		
Alfred L. Scotti	181a	185a		
Frederick Hamilton Sainthill	196a	204a	221a	
Martin J. Hodas	222a-299a	237a-321a		
Theophilus T. Jones	245a	258a		
Herbert Levin	272a	287a		

Exhibit Index

Government	Identification	In Evidence
1 through 6		51a
10, 11, 12		146a
13		148a
Defendant		
A		93a
B		95a
C	257a	
D	257a	

Docket Entries.

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

JUDGE METZNER

75 CRIM. 295

D. C. Form No. 100 Rev.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U.S.:
vs.	Edward J. Levitt, Sp. Atty 791-1150
MARTIN J. HODAS HERBERT J. LEVIN 7/24/75	
	For Defendant: (~~Xxxx~~)(HODAS) Kassner & Detsky 122 E.42St,NYC 10017 661-8190 Deft. Levin--James Benard 150 Bdwy,NYC 10038 233-0260

(03) STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk					
J.S. 3 mailed	Marshal					
Violation	Docket fee					
Title						
~~Xxx~~ 18:371 Consp. to impede the collection of revenue & defraud the U.S.(Ct.1) 26:7201 Income tax evasion.(Ct.2) 26:7206(1) False statement on income tax returns.(Ct.3) (Three Counts)						

DATE	PROCEEDINGS
3-19-75 ✓	Filed indictment. (Related to 75 Cr 253)
3-24-75	Both defts.(attys. present) Plead not guilty. Motions returnable in 10 days. Bail as to both defts. fixed $15,000. P.R.B. unsecured. Defts. ordered photographed and fingerprinted. Case assigned to Judge Metzner for all purposes. Brieant,J.
NO 03-25-75 ✓	BOTH DEFTS.--Filed notice of appearance by: Kassner and Detsky 122 E.42St,NYC 10017(Filed in 75 CR 253)
3-24-75 ✓	HODAS--Filed defts. affdt. and notice of motion for extension of bail limits as indicated,ret. on: April 28,1975 at 10am.
3-24-75 ✓	HODAS--Filed defts. affdt. of Martin Hodas in opposition to govts. mot to sever Hodas from the trial of Deft. Levin.
3-25-75 ✓	Filed govts. affdt. of Edward Levitt in opposition to defts. motion to suppress.
3-25-75 ✓	Filed govts. memorandum of law.

(over)

Docket Entries.

DATE	PROCEEDINGS
04-28-75	Filed govts. affdt. of Edward Levitt in opposition to defts. motion to extend bail limits
04-28-75	Filed govts. supplemental affdt. of Edward Levitt.
03-24-75	MARTIN HODAS--Filed personal recognizance bond without security in the sum of $15,000.(filed in 75 CR 253)
03-24-75	HERBERT LEVIN--Filed personal recognizance bond without security in the sum of $15,000.(filed in 75 CR 253)
05-01-75	MARTIN HODAS--Filed memo end. on defts. motion dated ~~April 24,1975 to ext. bail limits---This application is denied unless defts. meet the conditions requested by the U. S. Atty. So ordered, Metzner,J.~~ m/n
05-19-75	BOTH DEFTS.--Hearing on motion to suppress is commenced. Metzner,J.
05-20-75	BOTH DEFTS.--Hearing contd. and concluded. Decision reserved. Metzner,J.
05-11-75	HODAS--Filed defts. affdt. and notice of motion for suppression,ret. on: April 11,1975 at 4:30pm.
05-11-75	HODAS--Filed defts. memorandum of law.
05-11-75	HODAS--Filed defts. reply affdt. by Martin Hodas re: motion to suppress.
05-11-75	HODAS--Filed defts. supplemental memorandum of law in support of motion to suppress.
05-11-75	Filed govts. notice of motion to sever deft. Hodas from Levin,ret. on: May 9,1975(affdt. attached)
05-11-75	Filed memo end. on above motion for sever of deft. Hodas--Motion is denied Metzner,J. m/n
05-11-75	FILED OPINION #42579--Motion to suppress is denied. Case will proceed to trial on Monday,July 21,1975 at 10am in Rm.2703. Briefs, requests to charge and voir dire questions shall be filed with the court in Chambers,Rm.2201 on or before July 15,1975. So ordered, Metzner,J. m/n
07-08-75	**HODAS--Filed govts. affdt. and OSC--ORDERED that deft.appear on July 10, 1975 in Part I,Rm.506 at 10:30am to show cause why his bail should not be arrested and held without bail pending disposition of this case,etc.; ORDERED that service be made by July 7,1975 by 5pm. Carter,J.** (To Miller in Misc. Unit for Pt. I cal.)
07-10-75	Filed Transcript of record of proceedings, dated May 19, 20, 1975
07-10-75	**HODAS--Filed defts. affdt. of Martin J. Hodas.**
07-14-75	**LEVIN--Filed Order--ORDERED that Herbert Kassner is relieved as defts. atty. and that James Benard is permitted to file his notice of appearance as counsel of record for said deft. Carter,J. m/n**
07-11-75	**LEVIN--Filed defts.notice of appearance by James Benard of 150 Bdwy,NYC**
07-14-75	**HODAS--Filed defts. appearance bond in the sum of $50,000cash. Deft. posted $35,000 cash (receipt#54685) and $15,000 posted by Franklin (receipt #54686).**

(see Pg. 3)

Docket Entries.

75 CR 295 USA VS HODAS ET ANO METZNER,J.

D. C. 110 Rev. Civil Docket Continuation XXX PAGE -3-

DATE	PROCEEDINGS	Date Ord Judgment
07-24-75	Filed govts. requests to charge.	
07-24-75	Filed defts. requests(deft. Hodas) for instructions to jury.	
07-21-75	Jury trial begun before Metzner,J. as to both defts.	
07-22-75	Jury Trial contd.	
07-23-75	Jury trial contd. Motion to dismiss ct. 3 as to deft. LEVIN is GRANTED. All other motions as to BOTH DEFTS. are denied. Metzner,J.	
07-24-75	Jury trial contd. and concluded. DEFT. HODAS--found NOT GUILTY on ct. 1 and GUILTY on cts. 2 & 3. PSI ordered. Sentence adj. to Sept. 9,1975. bail contd. DEFT. LEVIN--found NOT GUILTY as charged in this indictment. Metzner,J.	
08-15-75	HODAS--Filed govts. affdt. of Edward Levitt in opposition to defts. motion to temp. ext. bail limits.	
08-19-75	HODAS- Filed memo endorsed on deft's application to extend bail limits: Deft. Hodas bail limits are extended to include the City of Las Vegas, in the State of Nevada. However the defendant is expressly forbidden as a condition of the bail extension, from egaging in gambling activities of any kind. So ordered. -- Owen, J. m/n	
09-04-75	HODAS--Filed defts. affdt. of Martin Hodas re: opposing govts. motion to revoke and declare forfeited the bail of deft.	

Indictment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

75 CRIM. 295

----------x

UNITED STATES OF AMERICA :

-v- : INDICTMENT

MARTIN J. HODAS and HERBERT J. LEVIN, : S- 75 Cr.

Defendants. :

----------x

U.S. DISTRICT COURT FILED MAR 19 1975 S.D. OF N.Y.

INTRODUCTION

1. At all times material herein, East Coast Cinerama Theatre, Inc. also known as East Coast Cinematic Theatre, Inc. (hereinafter: East Coast Cinerama Theatre, Inc.) was a corporation with offices at 233 W. 42nd Street, in New York, New York, and engaged in the business of selling and renting films for peep show machines.

2. At all times material herein, MARTIN J. HODAS, the defendant, was President of East Coast Cinerama Theatre, Inc. and as such, was responsible for the general and fiscal management of said corporation.

3. At all times material herein, HERBERT J. LEVIN, the defendant, was Vice President of East Coast Cinerama Theatre, Inc. and as such was responsible for the fiscal management and collection of monies of said corporation.

COUNT ONE

The Grand Jury charges:

1. From on or about the 12th day of August, 1968 and continuing thereafter up to and including the 14th day of May, 1969, in the Southern District of New York and elsewhere, MARTIN J. HODAS and HERBERT J. LEVIN, the defendants, and other persons to the Grand Jury unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to commit offenses against the United States, to wit, to violate Title 26, United States

MICROFILM
MAR 19 1975

Indictment.

Code, Section 7201, and to defraud the United States and an agency thereof, to wit, the Internal Revenue Service of the Treasury Department of the United States.

2. It was a part of said conspiracy that the defendants, MARTIN J. HODAS and HERBERT J. LEVIN, would, by means of secret and hidden corporate books and records of East Coast Cinerama Theatre, Inc., defraud the United States and an agency thereof by impeding, impairing, obstructing and defeating the governmental functions of the Internal Revenue Service of the Treasury Department of the United States in ascertaining, computing, assessing and collecting revenue, to wit: income taxes due and owing from East Coast Cinerama Theatre, Inc.

3. Among the means whereby said defendants and co-conspirators would carry out the said conspiracy were the following:

(a) The defendants MARTIN J. HODAS and HERBERT J. LEVIN would maintain two separate sets of books and records one set of books and records for their accountants, to be used for the purpose of the corporate income tax; these books and records containing fraudulent and false statements of "peep show" machines and film sale income of East Coast Cinerama Theatre, Inc. and a second, secret set of books and records, containing the true and accurate income of East Coast Cinerama Theatre, Inc.

(b) The defendants MARTIN J. HODAS and HERBERT J. LEVIN would hide and keep secret from their accountants ar from the Internal Revenue Service, Treasury Department of the United States, a secret set of books and records, referred t in paragraph 3(a) herein, and would unlawfully, wilfully and knowingly present false and fraudulent books and records sho false and fraudulent and understated income to their accountants and bookkeepers for the purpose of having said

false, fraudulent and understated income transmitted to the Internal Revenue Service on the Corporate Income Tax Return for 1968 of East Coast Cinerama Theatre, Inc. thereby reducing the taxes due and owing by East Coast Cinerama Theatre, Inc. to the United States of America.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants and their co-conspirators committed and caused to be committed in the Southern District of New York the following overt acts among others:

1. In or about March, 1968, the defendants MARTIN J. HODAS and HERBERT J. LEVIN became officers in East Coast Cinerama Theatre, Inc., New York, N. Y.

2. From on or about August 12, 1968 up to on or about February 28, 1969, in the Southern District of New York and elsewhere, the defendant, HERBERT J. LEVIN kept periodic records, to wit: daily books and collection books of monies reflecting the true income of East Coast Cinerama Theatre, Inc.

3. From on or about August 12, 1968 up to or on about February 28, 1969, in the Southern District of New York, and elsewhere, the defendants, MARTIN J. HODAS and HERBERT J. LEVIN, falsely and fraudulently made and caused to be made income sheets and records and data falsely showing the income, for the same period of East Coast Cinerama Theatre, Inc.

4. From on or about August 12, 1968 up to on or about February 28, 1969, the defendants MARTIN J. HODAS and HERBERT J. LEVIN presented and caused to be presented false and fraudulent income sheets, records, data and day books described in paragraph 3 herein, to Phil Weinper, C.P.A. and Robert Johnson at 233 W. 42nd Street, New York, New York.

5. On or about May 14, 1969, the defendant, MARTIN J. HODAS, as president of East Coast Cinerama Theatre, Inc. signed a U.S. Corporate Income Tax Return Form 1120.

(Title 18, United States Code, Section 371)

Indictment.

COUNT TWO

The Grand Jury further charges:

That on or about the 14th day of May, 1969, in the Southern District of New York, MARTIN J. HODAS and HERBERT J. LEVIN, the defendants, who were the President and Vice President, respectively, of East Coast Cinerama Theatre, Inc., a corporation located at 233 West 42nd Street, New York, New York, did unlawfully, wilfully and knowingly attempt to evade and defeat a large part of the taxes due and owing by the said corporation to the United States of America for the fiscal year ending February 28, 1969 by preparing and causing to be prepared and filing and causing to be filed with the Internal Revenue Service a false and fraudulent corporate income tax return, Form 1120, of East Coast Cinerama Theatre, Inc., wherein it was stated that the corporation's taxable income for the fiscal year ending February 28, 1969 was $4,493.41 and that the amount of tax due and owing thereon was $171.78, whereas, as the defendants then and there well knew the corporation's income for the fiscal year ending February 28, 1969 was $139,459.81 and that the amount of tax due and owing to the United States of America was $65,397.37.

(Title 26, United States Code, Section 7201, and Title 18, United States Code, Section 2)

COUNT THREE

The Grand Jury further charges:

That on or about the 14th day of May, 1969, in the Southern District of New York, MARTIN J. HODAS and HERBERT J. LEVIN, the defendants, did unlawfully, wilfully and knowingly make and subscribe and did unlawfully, wilfully and knowingly aid, abet, assist and cause to be so made and subscribed a corporate income tax return, Form 1120, for East Coast Cinerama Theatre, Inc., a corporation located at 233 West 42nd Street, New York, New York, which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Internal Revenue Service, which said tax return they

Indictment.

did not believe to be true and correct as to every material matter in that the said defendants stated therein that the gross receipts of East Coast Cinerama Theatre, Inc. for the taxable year ending February 28, 1969 were $86,179.20 whereas, as the said defendants then and there well knew, the gross receipts of said East Coast Cinerama Theatre, Inc. for the fiscal year ending February 28, 1969 were $359,586.60.

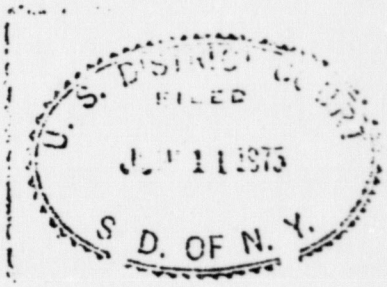
(Title 26, United States Code, Section 7206(1) and
Title 18, United States Code, Section 2)

FOREMAN

Paul J. Curran

PAUL J. CURRAN
United States Attorney

Opinion.



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

-against-

MARTIN J. HODAS and
HERBERT J. LEVIN,

Defendants.

73 Cr. 295

- x

METZNER, D.J.:

The defendants are charged in an indictment with tax evasion. They move to suppress as evidence the books and records seized from the business premises of East Coast Cinematics, Inc. (East Coast), 113 West 42nd Street, New York, N.Y. Defendant Hodas is the president and 100 per cent stockholder of East Coast. Levin is its vice-president. They claim that the books and records are "fruit of the poisonous tree" and that they were obtained pursuant to a "general" warrant.

An evidentiary hearing was held on this motion which developed the following facts. On January 27, 1972, Detective Donald Gray of the Public Morals Division, Central Investigation Unit of the New York City Police

Opinion.

Department, obtained a search warrant to search "210 West 42nd Street, ground floor bookstore, store area and cash register" for a named obscene magazine, and books and records related to its purchase and sale. This bookstore is operated by one Black Jack Books, which is not connected with East Coast. The validity of this warrant is not questioned.

The premises were divided into three parts, a bookstore area, an area containing "peep show" machines set up for operation, followed by a closed area accessible only through a door in the rear of the peep show area. The public could freely move in the first two areas. The door to the rear was open when the detective entered the premises. He observed a man working on a film coating machine inside the door.

Once inside the room Gray noticed a film box which had a still photo pasted to it. By looking at the film leader, he saw the title "Sex Nurse," and by looking at the frames, he saw that the film was "Sex Nurse," which had been "deemed" obscene. This "deeming" was the result of a nonadversary finding by Judge Robert Haft

less than one month previously. Upon further examination he noticed other films and film boxes, among them several marked "Superman" and "Piss on Susan," titles he knew to have been seized in other raids.

The man at the film coating machine stated that the premises were operated by East Coast, not by the bookstore, and took the detectives downstairs to prove this fact. In the basement Gray observed in excess of 100 peep show machines. Gray also discovered a certificate of occupancy showing that East Coast, whose address was listed as 113 West 42nd Street, was the tenant of the premises.

By this time Assistant District Attorney John Jacobs had arrived. On his instructions, nothing was seized from the East Coast premises, but Gray went downtown to Jacobs' office where he obtained copies of "Superman" and "Piss on Susan" that had been seized in other raids on other stores. He took these films to Judge Weiss who viewed them and issued a search warrant for the East Coast premises at 210 West 42nd Street for these two films and for "Sex Nurse," as evidence of the crime of wholesale promotion of obscene materials, N.Y. Penal Law

§ 235.06. According to Gray's affidavit, "Sex Nurse" had been deemed obscene by Judge Haft.

At the same time, based on a separate affidavit which only referred to "Sex Nurse," Judge Weiss issued a warrant for the search of East Coast's offices at 113 West 42nd Street for "books and records of East Coast Cinematics Inc. reflecting a 'peep show' business in New York County in violation of 235.06 of the Penal Law . . . ." Pursuant to this warrant, police seized certain corporate books and records from defendants' desks and files which were used to obtain the indictment charging income tax evasion. It is these books and records that defendants seek to suppress.

I. Standing

There is no question that the initial warrant was properly issued. The question is whether it was legally executed as it affects these defendants.

The government argues that defendants lack the standing to attack the seizure of the records. In Brown v. United States, 411 U.S. 223 (1973), the Court, in its most recent formulation of the standing requirements for Fourth Amendment claims, found no standing where the

defendants

> "(a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." Id. at 229.

It is obvious that defendants here were neither on the premises nor was possession of anything searched for, or later seized, an element of the crime with which they are charged. Accordingly, in order to have standing, defendants here must show a sufficient proprietary or possessory interest in the premises at 210 West 42nd Street.

In Mancusi v. DeForte, 392 U.S. 364 (1968), the Court held that a union representative had standing to suppress evidence of the union's records seized illegally from a desk in his office in the union's premises. Of course, he had no personal possessory or proprietary interest either in the records or in his office space. However, the Court stated that:

> "capacity to claim the protection of the [Fourth] Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was a reasonable expectation of freedom from governmental intrusion." Id. at 368.

The Court noted that DeForte spent a considerable amount of time in his office, and that the records seized were in his actual custody at the time of seizure.

In the instant case, it is true that the premises at 210 West 42nd Street were leased by East Coast, of which Modas was the sole stockholder and both defendants were officers. However, neither maintained offices at this location. They were there only irregularly. East Coast's portion of the premises was open to employees of the book-store who had to pass through to reach the rest room. There were no desks for the defendants, no files, no designated areas in which they worked. Thus, the defendants cannot achieve the expectation of privacy referred to in Mancusi and do not have standing to challenge the execution of the search of 210 West 42nd Street.

Even if these defendants have standing to attack the search, they have failed to sustain their burden of proof that the search of 210 West 42nd Street was illegal.

Turning now to the search of 113 West 42nd Street. In that location both defendants had desks from which most of the records were taken. They had custody of the corporate records at that time. This is the Mancusi situation exactly.

and the requisite expectation of privacy is present. Accordingly, they have standing to challenge both the warrant issued and the execution of that warrant as to 113 West 42nd Street.

At this point it must be emphasized that we are not dealing with fruit of the poisonous tree.

II. Probable Cause

Defendants argue that Judge Weiss did not have probable cause to issue a warrant for 113 West 42nd Street in that there was insufficient basis to believe that East Coast was operating a wholesale business in obscene matter.

Defendants first argue that the affidavit submitted to obtain this warrant was deficient in that it only mentioned the film "Sex Nurse," a film which Judge Weiss had not viewed, and which had only been "deemed" obscene by another judge. They rely heavily on People v. Comer, 73 Misc. 2d 623, 342 N.Y.S.2d 903 (N.Y.C. Crim. Ct. 1973), which held that in seizing obscene materials, a "deeming" must be made by the judge issuing the warrant, and that reliance on another judge's determination, prior to a determination at an adversary hearing, is impermissible. While this court has serious doubts about the foundation

for this ruling, it need not decide the issue, because this warrant was issued not for the seizure of obscene materials, but for the seizure of books and records. Unless such seizure amounted to a wholesale seizure for the purpose of stopping distribution of material protected by the First Amendment, see infra, there is no First Amendment protection that attaches to the corporate records here involved.

I find that the finding of Judge Haft, in addition to the other averments in the affidavit, is sufficient to support a finding of probable cause in this case.

Some effort was made by the defendants to prove at the hearing that in fact the coating was being performed for third persons. They failed in this attempt which, in any event, would not have been helpful in determining probable cause. Hundreds of peep show machines on the premises and hundreds of reels of film can lead a reasonable person to believe that they belong to the owner.

Finally, defendants argue that there was no guarantee that the films seen by Detective Gray were the same as those deemed obscene by Judge Haft, or seized from the other locations and presented to Judge Weiss.

Defendant argues that, since films tear, are edited, and the like, there are no two films the same, and that therefore, a finding of probable cause is impossible. While it may be true that a pornographic film varies slightly from copy to copy, it is unlikely, to say the least, that a rip or tear would turn it into the Shirley Temple movie that defense counsel opines is shown in the rear of Forty-Second Street bookstores. In all probability, there are sufficient similarities to allow the judge to make a decision as to obscenity based on what is reasonably believed to be an identical copy.

Accordingly, I find that there was probable cause to issue the warrant for the search of 113 West 42nd Street.

III. "General" Warrant

Defendants claim that the warrant for 113 West 42nd Street was a general warrant as prohibited by Stanford v. Texas, 379 U.S. 476 (1965). On the contrary, the instant case differs from Stanford in almost every key respect. First, in Stanford, the search was of a private home where the defendant resided, and where he carried on a mail order business. The materials to be seized were records of the Communist Party of Texas. Second, and more

importantly, the rule in Stanford is that "the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." Id. at 485 (emphasis added).

The Court noted that:

> "The word 'books' in the context of a phrase like 'books and records' has, of course, a quite different meaning. A 'book' which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case. . . . And in some situations books even of the kind seized here might, for purposes of the Fourth Amendment, be constitutionally indistinguishable from other goods--e.g., if the books were stolen property." Id. at 485 n.16 (citation omitted).

Here, the court is dealing with business papers related to an allegedly illegal operation. The books themselves are not the type of books under discussion in Stanford.

In United States v. Scharfman, 448 F.2d 1352 (2d Cir. 1971), cert. denied, 405 U.S. 919 (1972), the Court of Appeals stated, in a case dealing with books and records related to a theft of furs, that "a general search for books and records was not directed by the

warrant. Only those books and records used as 'means and instrumentalities of the crime' were or could have been seized pursuant to the warrant." Id. at 1355. The same is true in this case. Defendants, however, seek to distinguish Scharfman on the ground that it does not deal with a First Amendment situation. It is true that decisions in this district have held that, prior to a proper determination of obscenity, mass seizure of all business records of a concern precluding it from operating a legitimate business in items protected by the First Amendment constitutes a prior restraint. G.I. Distributors, Inc. v. Murphy, 336 F. Supp. 1035 (S.D.N.Y.), rev'd on other grounds, 469 F.2d 752 (2d Cir. 1972), vacated and remanded, 413 U.S. 919, prior reversal reaff'd, 490 F.2d 1167 (2d Cir. 1973), cert. denied, 416 U.S. 939 (1974); Star Distributors, Ltd. v. Homan, 337 F. Supp. 1362 (S.D.N.Y. 1972).

Both cases were decided prior to the Supreme Court ruling in Heller v. New York, 413 U.S. 483 (1973), in which the Court held that an adversary proceeding was not required prior to seizure. A nonadversary proceeding "deeming" obscenity now suffices.

In addition, both of the district court cases held only that the records had to be returned, and specifically directed that the records be held available to law enforcement authorities. In fact, defendants in this action had their records returned in a separate action under 42 U.S.C. § 1983. Hodas v. Hogan, 72 Civ. 554 (S.D.N.Y. February 15, 1972) (Bauman, J.). Thus, their First Amendment rights have been sustained, but that is not the issue here.

The purpose behind the ruling, if valid, after the Heller holding, is to protect the right of the public to obtain protected material, and to avoid prior restraint. It is not to protect the holder of records that are evidence of criminal activity. It does not mean that the records may be suppressed as evidence.

Affidavits for warrants must be construed liberally and flexibly, under all the circumstances, with a view to the pressures of time and in the interests of justice. Spinelli v. United States, 393 U.S. 410 (1969); United States ex rel. Rogers v. Werden, 381 F.2d 209 (2d Cir. 1967). Judge Weiss had just viewed the films "Piss on Susan" and "Superman," the films found at

210 West 42nd Street, and deemed them obscene in connection with Gray's affidavit for the search of 210 West 42nd Street. At the very same time he approved the search of 113 West 42nd Street. It is fair to conclude that he relied on all the facts of which he was aware at the time.

Finally, defendants argue that the finding of Judge Bauman, mentioned above, that the search was a mass seizure, is binding on this court. Questions of collateral estoppel are rare in federal criminal cases. However, several factors should be noted here. First, the United States was not a party to the action before Judge Bauman, and has not had an opportunity to litigate the issue. Second, there has been a vital change in the law [Heller v. New York, supra] since Judge Bauman's decision, a factor that prevents the operation of collateral estoppel. Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948); Hoederland v. Commissioner of Internal Revenue, 424 F.2d 629 (7d Cir. 1970). Therefore, I find that any finding of fact that may have been made by Judge Bauman is not binding on this court.

Opinion.

I might add that, as to the reasonableness of the search in question, the New York Penal Law defines the only essential difference between the crime of promotion of obscene materials (a misdemeanor), and the wholesale promotion of obscene materials (a felony), as the intent to resell the material. N.Y. Penal Law §§ 235.00(4), 235.00(5) (McKinney & Supp. 1967 & 1974). It is difficult to see how such a crime could ever be proved if not through the evidence of business records related to the offense.

For all of the above reasons, the motion to suppress must be denied.

This case will proceed to trial on Monday, July 21, 1975, at 10:00 A.M. in Room 2703. Briefs, requests to charge and voir dire questions shall be filed with the court in chambers, Room 2201, on or before July 15, 1975.

So ordered.

Dated: New York, N.Y.
June 10, 1975

CHARLES M. METZNER
U. S. D. J.

Extracts of Testimony.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA vs. MARTIN J. HODAS and HERBERT H. LEVIN, Defendants.	Before: HON. CHARLES M. METZNER, District Judge.

New York, May 19, 20, 1975

STENOGRAPHER'S MINUTES

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

vs. :

MARTIN J. HODAS and HERBERT H. LEVIN, : 75 CR. 295

Defendants. :

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May 19, 1975

Before:

HON. CHARLES M. METZNER,

District Judge

APPEARANCES:

PAUL J. CURRAN, ESQ.,
United States Attorney,
For the Southern District of New York
By: EDWARD J. LEVITT, ESQ.,
Assistant United State Attorney

HEBERT KASSNER, ESQ.,
Attorney for Defendants.

THE COURT: All right, the Government may proceed.

MR. LEVITT: Your Honor, I was under the impression that the defendant would be going forward at this time first, since it is their motion to suppress.

THE COURT: No, I will take the Government first.

MR. LEVITT: Then, your Honor, I would ask for five minutes to obtain a witness who has been down in my office.

THE COURT: All right.

THE CLERK: You may present.

MR. LEVITT: Thank you, your Honor.

Government calls Detective Donald Gray to the witness stand.

D O N A L D G R A Y, called as a witness for the Government, having first been duly sworn, tesetified as follows:

THE WITNESS: My shield number is 697. I am attached to the Organized Crime Control Bureau of the New York City Police Department.

DIRECT EXAMINATION

BY MR. LEVITT:

Q Detective Gray, how long have you been employed with the New York City Police Department?

A Approximately 14 years.

Q And have you been continuously so employed during those 14 years?

A Yes, I have.

Q How long have you been connected or serving on the Organized Control staff?

A Since its inception, about, I think it was about two years ago, sir, two-and-a-half years ago.

Q Were you serving on that staff in January of 1972?

A I am not sure whether I was or not, sir. I'd have too -- I don't know whether we were Public Morals at that time. We have had a number of names during the course of the period of time. I don't remember when it was started the Organized Crime Control Bureau. We were just picked up by -- we had been a public morals -- I have been in Public Morals since 1965.

Q Detective Gray, directing your attention to the month of January, 1972, did there come a point during that month when you had any dealings in your official course of business concerning a bookstore located at 210 West 42nd Street, New York, New York?

A Yes, I did.

Q Would you please state for the Court how you first

came to have dealings concerning that bookstore?

A On that date?

Q On any time in January of 1972.

A Well, I have known of that bookstore and other various bookstores in the Times Square area. My job with the New York City --

MR. KASSNER: Objection, your Honor.

He's not responsive to the question.

THE COURT: Overruled.

A My task with the New York City Police Department is the enforcement of the obscenity laws, and I have come in contact with that store and other stores on a number of occasions. That particular time in January, there was a purchase of a magazine made in that store which was then presented to a judge and a search warrant obtained for--

Q In obtaining that search warrant, did you submit an affidavit to the court?

A Yes, I did.

Q I show you what has been marked as Government's Exhibit 1, and ask you if you can recognize that document.

A Yes.

Q Would you please state what that document is, sir?

A That's the -- this is an affidavit for a search warrant for 210 West 42nd Street.

Q Is that in fact a copy of the affidavit you submitted?

A Yes, it is.

Q Is there a date on that document?

A Yes, it was signed on January 27, 1972.

Q At the time you submitted that document, sir, to whom did you submit it?

A To Judge Hyman Solniker.

Q When you submitted that document, did you also submit that magazine?

A Yes, I did.

Q To your knowledge, did Judge Solniker review that magazine?

A Yes, he did.

Q Were you present during that time?

A Yes, I was.

Q And upon subsequent review of that document, did Judge Solniker issue a search warrant for the premises of 210 West 42nd Street and an individual named Donald Styles?

A Yes.

Q I show you what has been marked as Government Exhibit 2 for identification, and ask you if you recognize that document, sir.

A Yes, that's the search warrant to go along with the

affidavit, sir.

Q Does that document have a date on it?

A Yes, January 27, 1972.

Q Pursuant to that search warrant, did you thereafter go to the premises known as 210 West 42nd Street?

A Yes, I did.

Q Did you go by yourself, or were you in the company of other officers?

A I was in the company of other officers, sir.

Q At that time when you went to that address, was that the bookstore?

A Yes, it is a bookstore.

Q Did you thereafter proceed to search that store?

A Yes, I did.

Q Would you please describe how you and the other officers proceeded to search the store?

A The search procedure was done in the normal fashion of police searching for the magazine "Libido," volume 1, number 3, and also an effort to obtain the records of the sale of that magazine to the store; and other business records pertaining to that store.

Q Physically when you walked into the store, were there other people there?

A Yes.

Q What occurred?

A I believe I asked the gentleman who was working in the store to ask everyone to leave, and that we had a search warrant for the premises; and he complied to that, and he asked the people to leave the store.

Q Thereafter, what did you do?

A Thereafter, we, along with myself and other officers, looked for the magazine, and the records contained -- pertaining to that magazine.

Q In the back of this physical premise, sir, as you were searching, that is, within the book area itself, other than books, were there any machines in that premise?

A Yes, there were.

Q What were those machines?

A They were commonly referred to as peep machines. They are machines at which you deposit 25¢ and you view a section of film.

THE COURT: Where were these machines?

THE WITNESS: They were in the rear of the store, sir.

THE COURT: In the store itself or behind a partition, in a back room or what?

THE WITNESS: Well, the store had a partition coming across one portion. The machines themselves were in

a separate section of the store but still part and parcel of the store. There was nothing preventing anybody from the store walking through.

THE COURT: There was no door that you had to go through?

THE WITNESS: No, sir.

THE COURT: All right.

BY MR. LEVITT:

Q Past those machines, was there a door?

A To the one side of those machines there was a door, yes.

Q Was there any name of any company on that door at the time that you were there?

A No, sir, there was not.

Q Was that door at the time you were there open or closed?

A My best recollection is that it was open, sir.

Q Did you look in that door?

A Yes, I did.

Q Please tell the Court what you observed?

A I observed a man working on a machine, and a machine which was in operation with film on it.

THE COURT: That's two machines? You said a man was working on a machine.

THE WITNESS: Well, he was working in front of the machine, and there was just -- there's one machine. I believe the one machine would have been capable of handling more than one roll of film, but there was only one roll of film involved at this particular time.

THE COURT: It was in operation?

THE WITNESS: Yes, it was.

BY MR. LEVITT:

Q Was that what you have been calling a peep machine?

A No, sir, it was not.

Q Did you recognize that machine?

A Yes, it's a machine that was commonly used in the industry to shellac film that would be put into a peep show machine.

Q Did you observe anything else in that room at that time?

A Yes, there were some boxes on the table, and some film in the boxes, and there was a film on the machine, sir.

Q Was anything lying about on the floor?

A On the floor. There were boxes on the floor. There were paper bags on the floor, other things.

Q Having made this observation, what did you do?

A I went up to the gentleman, I identified myself as

a police officer.

THE COURT: Which gentleman?

THE WITNESS: I believe his name was Mr. Sainthill.

THE COURT: What was he doing there?

THE WITNESS: He was the gentleman standing at the machine.

THE COURT: Go ahead.

BY MR. LEVITT:

Q Please continue, sir. You were stating what you were doing.

A I went to this gentleman, I identified myself, I informed him that I was conducting a search of the premises, and that I asked him what he was doing. He said he worked there. I believe he told me at that time that he worked for East Coast Cinematics; and at that point I advised him of his rights but did not place him under arrest.

He asked me, he said, "We have nothing to do with the store."

He took me downstairs to the basement section, opened another door, showed me another room where they had projectors, and only repaired them. On the way through there, there were quite a few peep show machines on the sides.

Q You state that Mr. Sainthill took you downstairs?

A Yes, he did.

Q Was that because you ordered him to?

A No, sir.

Q Did he volunteer to take you downstairs to show it to you?

A He volunteered to show me it, show me that he had nothing to do with the store, that it was a different area.

Q Thereafter you came up from downstairs and went back into the bookstore; is that correct?

A Yes, sir.

Q What occurred at that point?

A I was informed that -- well, I believe that there was some film on the machine which I think we picked up at that point. I'm not quite sure exactly when we picked it up, but I think it was picked up at that point, and I was informed that the district attorney was en route.

Q By another officer?

A Yes.

Q Did that district attorney eventually --

MR. KASSNER: Excuse me, could you please repeat that last answer?

THE COURT: "I was informed by another officer that a district attorney was en route."

MR. KASSNER: Was what?

THE COURT: En route, e-n, r-o-u-t-e.

MR. KASSNER: I'm sorry.

BY MR. LEVITT:

Q Did that assistant district attorney arrive?

A Yes, sir, he did.

Q Do you remember who that was?

A Yes, Assistant District Attorney John Jacobs.

Q During the course of time up to the point where Mr. Jacobs arrived, did anybody else other than an officer enter the bookstore?

A Yes, Mr. Jones.

Q When you first entered the bookstore, and you say you addressed the person behind the counter, I believe, do you know who that person was?

A I believe, sir, his name was Alfred Scotti.

Q Upon Mr. Jacobs' arriving, would you please state what occurred?

A I explained, I believe I explained the circumstances to Mr. Jacobs, of what had thus far transpired. He spoke to both gentlemen regarding the back area, and East Coast Cinematics; and --

Q Both gentlemen? Who are you referring to?

A Mr. Sainthill and Mr. Jones.

Q Were you privy to those discussions?

A Portions of them, yes.

Q Did you thereafter leave?

A Yes, sir, I did.

Q Did there come a time during that same day when you had another warrant executed in connection with the warrant you have just discussed?

A Yes, sir.

THE COURT: What was that date again?

MR. LEVITT: January 27, your Honor.

Q Was it one warrant or more than one warrant?

A I applied for two warrants, sir.

Q Do you recall what premises you applied to search?

A Yes, sir, the portion of 210 West 42nd Street which was designated -- which was claimed to be designated East Coast Cinematics, and 113 West 42nd Street on the 17th floor, the offices of one Martin J. Hodas.

Q Did you submit affidavits to the court?

A Yes, I did.

Q I show you what has been marked specifically as Goverment's Exhibits 3 and 5 for identification; and ask you if you recognize these documents.

A Yes, I do.

Q Looking at Exhibit 3, sir --

A Yes.

Q -- is that the affidavit which you submitted to

search the rear portion of the bookstore at 210 West 42nd Street?

A Yes, the rear portion and basement of that premises, sir.

Q And is that dated, sir?

A Yes.

Q What is the date?

A The 27th, I believe, sir.

Q Who did you submit that affidavit to, if you can recall?

A Judge Weiss.

Q Was there any reason that you did not return to Judge Solniker?

A I don't recall.

Q When you submitted the affidavit, did you go to Judge Weiss in particular or did you go to the judge sitting in a particular section of the court?

A Most likely went to the judge sitting in a particular part of the court rather than as opposed to a particular judge.

Q So your best recollection is you just went to the judge sitting in the appropriate section of court?

A Well, yes, there's two appropriate sections involved in criminal court in Manhattan. It may be either

AR-1 or AR-2. And I am only speculating, maybe the judge was off the bench in the other part.

Q In any event, there was no particular reason which caused you not to go to Judge Solniker?

A Not to my -- no.

Q With regard to Exhibits 3 and 5, were they submitted simultaneously to Judge Weiss?

A Yes.

Q What is the date on Exhibit 5?

A It also bears January 27, 1972.

Q And is that the affidavit you submitted for a warrant to search the premises occupied by East Coast Cinematics at 113 West 42nd Street?

A Yes.

Q That also asks for permission to search the body of one Martin Hodas; is that correct?

A Yes.

Q Returning then to Exhibit 3 for a moment, sir, when you submitted that exhibit, did you submit anything for Judge Weiss' judicial review in connection with that affidavit?

MR. KASSNER: Objection, Your Honor, the affidavit speaks for itself and the warrant speaks for itself at basis for the issues of the warrant. Now the affidavit states what was submitted for the warrant. The warrant states what

was considered in the application for the warrant; and there is no reason for him to now attempt to put in parol evidence of something else that may have been considered or that he may have submitted in connection with the warrant. The affidavit and the warrant speak for themselves.

THE COURT: Mr. Levitt, are you going outside the affidavit?

MR. LEVITT: No, I am not, your Honor.

THE COURT: All right, objection overruled.

He's merely telling me what is in the affidavit, Mr. Kassner. Do you object to that?

What is the answer?

THE WITNESS: I believe there were, your Honor.

BY MR. LEVITT:

Q I direct your attention to the 5th paragraph of that affidavit.

MR. KASSNER: Which affidavit?

MR. LEVITT: Exhibit number 3.

THE COURT: Exhibit 3.

Q Have you located that paragraph, sir?

(Mr. Levitt indicated to the witness.)

THE COURT: You can read it, you know.

MR. LEVITT: It was a question leading up to it, your Honor.

A Yes, there were movies submitted to the judge to hear.

Q In particular were those two movies entitled "Superman" and the second title "Piss on Susan"?

A Yes, sir.

Q Now had you seen copies of those two movies in your first search of 210 West 42nd Street?

A Yes, sir.

Q Did you, as best you recall now, did the judge, Judge Weiss, review those two movies before issuing a search warrant?

MR. KASSNER: Objection, your Honor, his statement in the warrant tells what he did, and what he reviewed as a basis for the issuance of a warrant.

THE COURT: Well it's a difference between my reading it and his telling me what's in it. Do you object to him telling me what's in it?

MR. KASSNER: He's talking about what Judge Weiss did in preparation for issuance of the warrant.

THE COURT: If he actually saw Judge Weiss view the film, I will take it. That is his question.

BY MR. LEVITT:

Q Would you please answer.

A Could I have the question read back?

THE COURT: Did you actually see Judge Weiss view these films before issuing the warrant?

THE WITNESS: Yes, Sir, I did.

THE COURT: All right.

BY MR. LEVITT:

Q With regard to 210 West 42nd Street, the particular premise, you have testified about going in, you testified about a door in the back through which you had access which was partially open. Once inside that portion of the back room, did you see any other doors at all?

A No. The stairway down is not blocked off by a doorway. It's just a metal stairway. There were one or two doors laying on the left-hand side which were partition doorways that were laying there.

Q On the floor you mean?

A On the floor.

Q Off their hinges?

A Well, yes, they were propped up against the side. There was some wood. There was a regular junk area to the left as you walk down.

Q Turning to Exhibit number 5, sir, which is in front of you, and referring back to your statement that you were privy to portions of conversations between Mr. Sainthill and Mr. Jacobs, and then Mr. Jones and Mr. Jacobs --

A Yes.

Q -- dealing first with Mr. Sainthill, what do you recall of those portions of conversations you overheard in which Mr. Sainthill made any statements to Mr. Jacobs?

A Mr. Sainthill indicated that that portion of the store was -- belonged to East Coast --

MR. KASSNER: If your Honor please, I object to the question on the grounds it's hearsay.

THE COURT: Sustained.

A That it was --

THE COURT: I sustained the objection.

BY MR. LEVITT:

Q The objection has been sustained. You can't answer.

A I beg your pardon.

Q Whatever you did here, did you place that in the affidavit?

A Yes, I did.

Q And with regard to conversations which had been had between Mr. Jones and Mr. Jacobs to which you were privy, did you place that in the affidavit?

A Yes.

Q You are referring to Exhibit 5; is that correct?

A Yes, I am.

Q With regard to Exhibit 5, upon submission and the review of Judge Weiss, was a warrant issued?

A Yes, it was.

Q I show you Government Exhibit 6 for identification and ask you if you can identify it.

A Yes, that's the search warrant portion of Exhibit number 5.

Q And what is the date of that warrant, sir?

A The 27th.

Q Would you please state what premises and persons that warrant allowed you to search?

A The person of one Martin Hodas and East Coast Cinematics Company, 113 West 42nd Street on the 17th floor.

Q That was New York City?

A Yes, it's New York City

Q What were you authorized to search for?

A I was authorized to search for books and records of East Coast Cinematics reflecting peep show business in New York County involving 235.06 of the Penal Law.

Q Did you thereafter on that day proceed to the offices of East Coast Cinematics at 113 West 42nd Street?

A Yes, we did.

Q At the time you proceeded to East Coast Cinematics, upon arriving, did you see anything posted on the door to

that office?

A Yes, I did.

Q Was that a letter to the Post Office?

A No, sir.

THE COURT: Wait a second. The 17th floor, I assume, has a number of offices on it. Is that true?

MR. LEVITT: I am not fully --

THE COURT: Is the 17th floor further described by room number or office number? Do you have the warrant?

MR. LEVITT: Yes, the warrant itself, your Honor, does not speak of anything further than that office.

THE COURT: It authorized a search of East Coast Cinematics on the 17th floor of 113 West 42nd Street?

MR. LEVITT: Yes, your Honor.

THE COURT: All right.

When you got to 113 West 42nd Street, Detective Gray, how did you know which office to go to?

THE WITNESS: There was a sign on the door indicating East Coast Cinematics. There was a hand-written note with a number of other companies' names on it.

THE COURT: Just a hand-written note pasted on the door which you saw?

THE WITNESS: Yes, yes, I believe it was mentioned in the search warrant, sir.

THE COURT: You say it was East Coast's name on that note?

THE WITNESS: Yes.

THE COURT: Were there other names on the note?

THE WITNESS: Yes, there were.

THE COURT: All right, you may proceed, Mr. Levitt.

BY MR. LEVITT:

Q I show you Government Exhibit 7 for identification, Mr Gray, and ask you to examine it and state whether you recognize it.

A Yes, I do.

Q What do you recognize it as being?

A It's a letter to the U.S. Postal Department indicating a change of address for certain corporations from an old address to a new address.

Q Do you recall where you first saw that document?

THE COURT: What exhibit number is this?

MR. LEVITT: That is Exhibit Number 7, your Honor.

THE COURT: Do you recall where you saw that document?

THE WITNESS: No, sir, I do not.

THE COURT: All right, he does not know where he saw it.

A Detective Gray, upon seeing that list of names on that door that day, that is, January 27 or January 28 --

THE CORUT: What do you mean or January 28? So far he's said he went up to the 27th. I haven't heard anything from him regarding the 28th.

Q On January 27th, Detective Gray, did you seek any additional search warrants in connection with this matter?

A On which date, sir?

Q January 27th.

A I don't believe so, sir.

Q Did you ever seek any additional search warrants with regard to this matter thereafter?

A I don't recall whether this is -- I don't recall whether this is all the search warrants or not.

I seem to think there is another search warrant someplace.

Q I show you what is marked as Government's Exhibit number 9 for identification, and ask you if you can identify it?

A Yes, this is an affidavit for a search warrant.

Q What is the date of that affidavit?

A The 28th day of January.

THE COURT: Who made the affidavit?

THE WITNESS: I did, your Honor.

THE COURT: To search what?

THE WITNESS: To take books and records at 113 West 42nd Street.

Q Books and records of who?

A Of East Coast Cinematics, Island Amusement, Dynamite Films. There is a whole list here, Fun City Novelties, Cadwell Books, 113 Theater, Coast Holding Corporation, 414 West 42nd Street, and Island Amusement Corporation.

Q Were those names that you saw on the door on that piece of paper that you said was posted on it?

A I believe these names were affixed to the door, yes.

Q I direct your attention to paragraph number 7 of that document, sir; and I ask you --

A Yes, that letter came from those premises.

Q What letter?

A The Exhibit number 1, sir.

Q Number ?

A I'm sorry, number 7, your number 7.

Q So you are now stating that, based upon your reading of paragraph number 7 of Exhibit number 9, your recollection is now refreshed, and that document that I have previously shown you, which you could not identify, is in fact the letter that you found pasted to the door; is that

correct? I'm referring, sir, to Exhibit number 7.

A I'm not sure this was pasted to the door, sir.

Q When you first went up to East Coast Cinematics with a search warrant issued by Judge Weiss on the 27th of January for the premises at 113 West 42nd Street, did you gain entry to that office?

A Yes.

Q Please describe how that was accomplished.

A We knocked several times. There was no answer, and we broke into the premises.

Q At that door?

A Yes.

Q When you got into the premises, was anybody there?

A No, sir.

Q How long did you stay at those premises approximately, sir?

A At that particular time, perhaps an hour or so.

Q It was during the course of this search that the various records were seized; is that correct?

A During the course of the search.

Q In visiting 210 West 42nd Street, that is the book store and the rear premises, in execution of that search warrant, and in visiting the premises on the 17th floor of

113 West 42nd Street, did you ever see or speak to Martin Hodas on those occasions?

A On the occasions prior to?

Q At the time of the execution of the search warrants?

A No, sir, I never spoke to Mr. Hodas in person.

Q Did you ever see or speak to in person Mr. Levin?

THE COURT: You mean ever?

Q At the time of the execution of these two search warrants.

THE COURT: That's January 27th.

MR. LEVITT: Yes, your Honor.

THE WITNESS: No, sir, neither of them were there, sir.

BY MR. LEVITT:

Q At 210 West 42nd Street, did you see any plaque indicating any area reserving space for the use of Mr. Hodas or Mr. Levin?

A No, sir.

Q Did you see any such plaques at the office at 113 West 42nd Street?

A I'm not sure, sir.

Q Does that mean you have some recollection or no recollection?

A I seem to recall there was a desk with Mr. Hodas' name on it, but --

Q Do you recall any such desk for Mr. Levin?

A I think there was. He was in the office next door. I think there was a designation on that desk also, sir.

Q What was the physical state of the office at 113 West 42nd Street when you went in?

A Physical state?

THE COURT: Wait a second. You mentioned about a room next door. Were they part of the same premises that you entered on the 17th floor?

THE WITNESS: Yes.

THE COURT: So the premises took up two rooms?

THE WITNESS: I think there were three or four rooms, your Honor.

THE COURT: Three or four rooms?

THE WITNESS: They were all open to one common hallway. There was no additional doors to open.

THE COURT: Once you got into the original door?

THE WITNESS: Yes, yes. It was an office complex.

BY MR. LEVITT:

Q What I meant by physical state, sir, were things scattered about, or were they neatly stacked?

THE COURT: Let him describe it.

MR. LEVITT: Yes, your Honor.

A The place itself was in a considerable amount of disarray. I wouldn't say it was a neat place. I wouldn't say it was neat when we went in.

Q This was at the time you entered?

A Yes.

MR. LEVITT: At this time, your Honor, the Government would move Exhibits 1, 2, 3, 5 and 6 for identification --

THE COURT: What is 6?

MR. LEVITT: -- into evidence. Number 6, your Honor, is the search warrant for the premises of East Coast Cinematics at 113 West 42nd Street.

THE COURT: Show it to Mr. Kassner.

MR. KASSNER: I have no objection, your Honor.

(Government Exhibits 1, 2, 3, 5 and 6 for identification received in evidence.)

BY MR. TIMBERS:

Q Detective Gray, several weeks after January 27, 1972, did you again in the official course of your business have cause to visit the bookstore located at 210 West 42nd Street?

A I don't know whether it was two weeks. It was

a period of time I visited the store on and off periodically, and it may have been -- I think it was longer than two weeks that I was in the area again.

Q Can you give an outside estimate of the time?

A Maybe three or four weeks.

Q At that time, sir, did you have an opportunity to observe that door which you described as being partially open on your first visit?

A Yes.

Q Was there anything different about that door at this visit as against the condition of the door at your previous visit?

A Yes, it had -- it was closed, and it had the name East Coast Cinematics on the door on a plaque.

Q On a plaque on the door.

MR. LEVITT: I have no further questions, your Honor.

THE COURT: Mr. Kassner?

CROSS EXAMINATION

BY MR. KASSNER:

Q Mr. Gray, you just mentioned that you went back a few weeks afterwards, and the door which you described as partially opened had a plaque on it. That was the door between the peep show machines in the bookstore and the back

work area; is that correct?

A No, sir.

Q Was that the door dividing the public area of the bookstore from the premises which you later learned were the premises of East Coast Cinematics, Inc.?

A It was a door between an area to a rear room, yes, sir.

Q Which rear room are you referring to, Sgt. Gray?

A I am referring to the room which I first observed Mr. Sainthill standing in at the machinery.

Q Did you become aware that that was the premises of East Coast Cinematics, Inc.?

A Yes, I did.

Q So we will refer to that as the premises of East Coast Cinematics, Inc.

Did you know that the bookstore was not the premises of East Coast Cinematics, Inc.?

A No, sir, I did not.

Q Did you ever become aware of that?

A Yes.

Q Now we know what we are talking about. The door between the premises that were not part of the East Coast Cinematics, Inc. and that were part of East Coast Cinematics, Inc., that's the door we are referring to now; right,

Mr. Gray?

MR. LEVITT: Objection, your Honor.

THE COURT: I will take it. He's merely trying to identify the door.

A Yes, sir.

Q You stated that that door which you stated was partially opened on the date of your initial visit to the premises, when you came back two weeks later, had a plaque on it?

A Yes, and I don't believe I said it was two weeks. I said it was a period longer then that, sir.

Q Fine. Was this plaque a piece of wood?

A I don't know, sir.

Q It was a piece of substance other than the door; is that correct?

A That's correct.

Q What did it say on that plaque?

A It said, "East Coast Cinematics."

Q And that is all it said?

A That's all I recall it saying, sir.

Q Did you see the words "Do not enter" on the coor?

A No, sir.

Q You didn't see it the first time or the second time; is that correct?

A The first time there was no sign on there that said "East Coast Cinematics" and I don't believe there was any sign there that said "Do not enter."

Q Was there anything on the door the first time you came?

A I don't recall, sir.

Q You don't recall if there was or was not.

A I don't recall that there was anything on the door.

Q That means you don't recall that there was not; is that correct?

A I have no independent recollection that there was not.

Q That means there could have been something on the door, but you don't remember.

Now, when you first testified, you stated that the door was completely open and in answer to the last question of the United States Attorney, you said the door was partially open.

THE COURT: He said it was partially open the first time.

MR. KASSNER: He said partially open the first time?

THE COURT: Yes.

MR. KASSNER: That's not what my notes say, but the

record will manifest what he did say the first time.

Q Is it partially open or is it completely open?

A It was open enough for me to see into the back.

Q Let's determine how much it was opened enough for you to see. Would you say the door, as it was open, formed an angle to the door which would have been there had it been closed of how many degrees?

A I have no idea.

Q You understand that if it were 90 degrees, it would be entirely open; is that correct?

THE COURT: Not completely, no.

MR. KASSNER: What? 90 degrees --

THE COURT: Not necessarily. The open door might block your view from part of the room. The only completely open is back 180 degrees against the wall.

MR. KASSNER: Fine, your Honor.

BY MR. KASSNER:

Q If it were completely open, it would be 180 degrees. What would you describe the angle formed by the partially opened door to the jamb of a closed door would be?

MR. LEVITT: Objection, your Honor.

THE COURT: Overruled. He's trying to fix the openness of the door.

MR. LEVITT: Yes, your Honor, I was just objecting

because the witness was just asked that question and said he couldn't recall.

THE COURT: He's trying a second time. This is cross examination.

A I don't know what the angle to the door would be. It would be, as far as I am concerned, partially open, and to see into the back, but it is also, as far as I would be concerned, wide open because it means I don't have to open it, it does not -- to me wide open does not mean all the way back, sir. It means open enough for me to see through.

Q Was it open enough for you to pass through without opening it anymore?

A No, sir, it was not.

Q When you went into the premises of East Coast Cinematics, Inc., did you look at the door specifically to see what was on the door before entering those premises?

A At which location, sir?

Q 210. That's what we are talking about now, the bookstore, your initial entry into the bookstore.

A Yes, sir.

Q Did you look at the door that was partially open or were you interested in what was going on behind the door?

MR. LEVITT: I'm sorry, your Honor.

THE COURT: Not behind the door, in the room.

MR. KASSNER: In the room, your Honor.

THE COURT: No, if he said behind the door, that means the door is closed.

MR. KASSNER: Well, it was partially closed, your Honor. Every door that is partially open is partially closed.

THE COURT: All right. I will take the amendment to your question that he was interested in what was going on in the room.

BY MR. KASSNER:

Q Or were you interested in what was written on the door?

A I was interested in what was going on in the room.

Q Do you recall now looking at the door before entering?

A Sure.

Q What did you see on the door?

A I don't recall that I saw anything on the door, sir.

Q You don't recall.

A No.

Q But there might have been something on the door; is that correct?

A I don't recall.

Q What does that mean? Does that mean that you know there was nothing on the door, or that you don't recall there was anything on the door?

A It means that I think I would have an independent recollection if there was something on the door.

Q If I told you there are going to be five witnesses here testiying there was something on the door --

THE COURT: No, no.

Q Did police photographers come to the premises in the course of your search at 210 West 42nd Street of the East Coast Cinematics part of the premises?

A Yes, they did.

Q Did they take pictures?

A Yes, they did.

Q Did they take a picture of the door?

A I don't know, sir.

Q You don't know?

A No, sir.

Q Had you spoken to the U.S. Attorney before as to what testimony you were going to give today?

A Before when, sir?

Q Before you got on the stand.

A Yes, I did.

Q Did he tell you that he was going to ask you about

whether there was something written on the door?

A Yes.

Q And you were aware that the police photographers took pictures of the premises on that day; is that correct?

A Yes.

Q And you still didn't check to see if they took any pictures that would show the door?

A No, sir, I did not. I spoke to the attorney for the first time this morning at 8:30, sir.

Q That's the first time you spoke to the attorney?

A Yes, other than --

Q Did you take any steps between 8:30 and 11:00 o'clock or 8:30 and 10:30 to try and determine whether there were any pictures of the door taken by the police when this photographer was on the premises taht day?

A I took no steps other than talk to the Attorney General. I do not recall ever having seen any pictures of the door, sir.

Q That's not what I'm asking you, Mr. Gray.

THE COURT: He took no steps.

Q Do you recall Judge Solniker's warrant?

A Which one, sir?

Q Did Judge Solniker sign more than one warrant for

you that day?

A I don't believe so. I'm asking which warrant you are referring to.

Q I said Judge Solniker's warrant.

A Yes.

Q Do you recall Judge Solniker's warrant? Did he sign more than one warrant for you for the premises?

THE COURT: Wait, one question at a time.

Q Did he sign more than one warrant in connection with that day for you?

A I don't believe so, sir.

Q So you know what warrant I'm talking about.

THE COURT: Come on, Mr. Kassner.

MR. KASSNER: Well, I think the witness is being evasive.

THE COURT: Come on, ask a question.

BY MR. KASSNER:

Q Do you recall Judge Solniker's warrant?

A I recall Judge Solniker signing a warrant, yes.

Q Did he tell you what you were to look for?

A I don't recall whether he told me what to look for or whether the warrant itself designated what we were looking for, sir.

Q What did the warrant designate you should look for?

MR. LEVITT: Objection, your Honor. The exhibit speaks for itself.

THE COURT: Well, he's trying to test his recollection. He's entitled to do that.

THE WITNESS: It asks for a magazine called "Libido," number 1, number 3, and it asks for the records pertaining to that magazine, I think bills and maybe checks pertaining to that magazine.

Q Did the warrant say pertaining to the magazine?

A I don't recall the exact wording, sir.

Q Did the warrant say "Libido," volume number 3, and the above said books and records, the above said books and records referring to certain property, namely, "Libido," volume 3 and books and records of a bookstore at 210 West 42nd Street, New York City, including cash receipts and disbursement books, general ledgers and journals, sales invoices, bank statements, and cancelled checks are all evidence of the crime of obscenity, are in violation of 235.05 of the Penal Law and are located at 210 West 42nd Street, New York City?

Does that help refresh your recollection?

A You are asking me is that what the warrant stated, sir?

Q Is that what the warrant states?

A Yes.

Q Did you hear anything in there about books and records pertaining to "Libido" number one and three?

A No, sir, I didn't.

Q So Judge Solniker gave you the right to seize all of the books and records of that bookstore and one particular book; is that correct?

A I don't know whether that's so, sir. I'd have to look at this warrant.

Q Then take a look at the warrant.

A Okay, as far as I know, as far as I remember, this was an application for the books and records pertaining to Libido Magazine.

Q I am not asking you that. I am asking you what the warrant said you could search for and seize.

A For the records from Libido Magazine.

Q Is that what the warrant says?

A Yes, sir.

Q We'll let the judge determine what the warrant says. Thank you.

Now, what area of the bookstore, or what area of 210 West 42nd Street did the warrant authorize you to search?

A The store area, cash register area.

Q When you got to the rear of the bookstore, was

there an area that had no books in it?

A Yes.

Q That was the peep show area; is that correct?

A Yes.

Q Then you continued and went beyond the peep show area until you came to a partially closed door, you state?

A Yes.

THE COURT: Partially opened door.

MR. KASSNER: Partially opened door, I stand corrected.

THE COURT: He says.

BY MR. KASSNER:

Q And on this door, you don't recall anything being written?

A No, sir, I do not.

Q And if I tell you that in the U.S. Attorney's own papers he has annexed an affidavit of your district attorney which says the words, "no admittance" were written on that door, would you say that that is possible or impossible?

A I don't understand the question, sir.

Q In the U.S. Attorney's papers on this motion there is an affidavit submitted by the district attorney of New York County in which he states the words "no admittance"

were on the door at the time of your search, would you say that that is impossible?

A No, sir.

Q In other words, any words could have been on the door at the time of your search?

MR. LEVITT: Objection.

THE COURT: Sustained.

BY MR. KASSNER:

Q Does that help refresh your recollection as to what was on the door?

A No, sir, I don't have any recollection of anything being on that door, sir.

Q But the words "no admittance" could have been on the door; is that correct?

A I have no recollection of them being there.

Q I am asking you whether they could have been on the door.

A I don't know whether they could have been or could not have been, sir.

Q And the words "East Coast Cinematics, Inc., do not enter," could have been on the door, couldn't they?

THE COURT: We have been over this. He has no recollection of anything being on that door.

Q When did you first see the first person in East

Coast Cinematics' premises on January 27, 1972?

THE COURT: Where?

MR. KASSNER: 210 West 42nd Street.

A When did I first see him?

Q Yes.

A In the rear of the store, standing by the machine.

Q Were you in the premises at the time, in that room at the time?

A No, sir, I was still outside the room first time I saw him.

Q You were outside the door?

A Yes, sir.

Q And you saw him through the partially opened door?

A Yes, sir.

Q How far away from you was he?

A Seven, eight, maybe ten feet.

Q Did you then enter the premises?

A Yes, I did.

Q When did he first notice you that you could tell?

A I don't know. He kind of just turned around, heard the noise of, I guess, my stepping into the back.

Q You opened the door?

A I had to open it the rest of the way to get in, yes.

Q Did you have your gun drawn?

A No, sir.

Q Were you the only one to enter the premises at that time?

A I don't recall. I don't think so. There must have been other officers there.

Q Was there anybody with you at the time you entered the premises?

A I believe so, sir.

Q How many police officers?

A I have no idea, sir.

Q But you say you entered quietly, without gun drawn, and then what did you do?

A I informed the gentleman that I was a police officer, number one; and number two, that I was executing a search warrant, and he then informed me that this portion belonged to East Coast Cinematics.

Q Did you then leave?

A No, sir I did not.

Q You didn't leave. In other words, the first thing he told you when you entered the premises was that these -- this premise belongs to East Coast Cinematics, Inc. and had nothing to do with the bookstore; is that correct?

Q That's what he said.

Q That's what he said and you still didn't leave; is that correct?

THE COURT: You don't expect him to leave, do you? Do you expect this police officer to rely on a statement from an unknown man, turn around and walk out?

MR. KASSNER: No, I expect him to rely on what was on the door.

THE COURT: There is no evidence in this record that that was on the door.

MR. KASSNER: There will be, your Honor.

THE COURT: But there isn't right now.

MR. KASSNER: Yes, your Honor.

THE COURT: And I don't expect any police officer to turn around and walk out because somebody says this belongs to somebody else. He'd be a lousy police officer if he did that.

MR. KASSNER: Yes, your Honor. Let's talk about Mr. Gray as a good police officer.

THE COURT: Next question.

BY MR. KASSNER:

Q Detective Gray --

THE COURT: There is no jury here. Remember that.

MR. KASSNER: Yes, your Honor.

Q Detective Gray, when you entered the premises, did

you see any books in the premises at 210 West 42nd Street, that rear area belonging to East Coast Cinematics?

A Did I see books? No, sir.

Q You saw no books. You saw a machine which is a film machine; is that correct?

A Yes.

Q Did you recognize that machine?

A Yes, I did.

Q And you had seen that machine in many places on many cases; is that correct?

A No, sir.

Q You hadn't?

A No, sir.

Q This is the first time you had seen a machine of its kind?

A No, sir.

Q Where was the last time you had seen a machine of its kind?

A I'd have to reflect back to records. On one of the numerous factories that I made arrests at.

Q One of the numerous factories?

A Yes.

Q What type of film did you find in those premises, 210?

A Eight millimeter film.

Q How wide is a reel of eight millimeter film?

A It's eight millimeters wide, I believe, sir.

Q Well, how wide would that be in terms of let's say, inches?

A I'd have to have a conversion before me. It's done in millimeters and I only know it as being eight millimeters wide.

Q What is the diameter of a reel of eight millimeter film, normal reel.

A The normal reel of film, maybe six inches across.

Q What was the diameter of the reels that you found in these premises?

A Six inches across, I believe.

Q How large is each frame in an eight millimeter film?

MR. LEVITT: Objection, your Honor.

THE COURT: I don't know where you are going?

MR. KASSNER: Your Honor, allow me to ask the questions subject to connection.

THE COURT: No, come on.

MR. KASSNER: I'm going somewhere, your Honor.

THE COURT: I will sustain the objection if you are not going to tell me where you are going.

BY MR. KASSNER:

Q Did you look at any of the film at the 210 premises after entering on that day on January 27th?

A Yes.

Q You did? How did you go about looking at the film?

A I think I held it up to the light.

Q You held it up to the light?

A Yes.

Q Would you tell the Court how large a frame eight millimeter film is?

A I don't know how large it is, but it's quite small.

Q Did you have any sort of magnifying device with you?

A I don't believe I did, sir.

Q When you hold up a frame of eight millimeter film to the light, can you tell whether the sex in the film is explicit or simulated?

MR. LEVITT: Objection, your Honor.

THE COURT: Overruled.

A I don't hold up a frame of eight millimeter film. I hold up a lot of frames.

Q But you can only see the one frame at a time, can't you, even if you hold up a lot of film?

A No, your eye focuses on all of the frames.

Q Can you tell whether it's simulated or explicit

by holding up eight millimeter film to the light?

A Depending on the action, yes.

Q Would you please tell the Court exactly what you did after you opened the door and came into the premises and spoke to Sainthill -- I mean spoke to -- who did you speak to when you came in?

A Mr. Sainthill, sir.

Q Mr. Sainthill. What did you do with respect to the film in the premises on that visit on that occasion?

A I don't think -- we eventually seized it.

Q I'm not asking what you eventually did. You are now in the premises?

A Right.

Q You spoke to Sainthill. What did you do with respect to the film in that premises at that time?

A Right then and there, nothing.

Q You didn't look at it?

A No, sir, he took me downstairs.

Q You mean you never looked at the film?

A I didn't say that, sir.

Q On that visit did you ever look at the film?

A Yes.

Q Tell the Court when, where and how.

A When we came back upstairs from being downstairs,

I believe I walked outside with Mr. Sainthill, and I came back with Sgt. Horman, I believe, and I looked at the film.

Q How long after your entry into the premises the first time did you start looking at the film?

A I have no idea.

Q Was it five minutes?

A I don't have an idea.

Q Was it an hour?

A It certainly wasn't an hour, sir.

Q 15 minutes?

A I have no recollection.

Q But the district attorney still hadn't come; is that correct?

A I don't know, sir.

Q You don't know if the district attorney had come yet?

A No, sir, I do not.

Q Do you recall when Mr. Jones came?

A I remember coming up in the front of the store and finding Mr. Jones there, yes.

Q Was this before or after you looked at the film?

A The film had been looked at at that point, I believe.

Q These films are in boxes; is that correct?

A Yes.

Q Where were the boxes?

A On the table.

Q On a table?

A Yes.

Q Where was the table?

A The table was attached to the machine.

Q When you saw these boxes, did you know what they were?

A I believe they were marked on the outside of the box, sir.

Q Just by reading?

A By name I would know, yes.

Q Forget about the name. When you walked into the door of those premises, and you saw that machine and those boxes on the table next to it, did you know what was in the boxes?

A I knew that they were eight millimeter films, yes.

Q So you didn't have to open the boxes to determine that there was eight millimeter film in the boxes?

A No, sir.

Q Did you see any books in the premises?

THE COURT: You have asked him that already.

MR. KASSNER: All right.

Q When I am talking about books, I am talking about magazines, books, right? Did you see any?

A No, sir, I did not.

Q Did you believe any books and records of that bookstore were contained in these boxes?

A No, sir.

Q Why did you open the boxes?

A Because I believed I was observing another violation of law.

Q But you could only determine that after you looked in the boxes; is that correct?

A No, sir, the name on the outside of the box was a film that we had previously had deemed obscene.

Q Outside of every box?

A As I recall, no.

Q How many boxes were on the premises?

THE COURT: When you speak of boxes, you mean boxes contained a role of eight millimeter film?

MR. KASSNER: Film, yes.

THE COURT: Or a box that has numerous --

THE WITNESS: No, sir, I am talking about individual rolls of film.

THE COURT: Individual?

THE WITNESS: A box that has no other writing on it

except that.

Q How many such boxes were on the premises?

A Off the top of my head, I'd say eight, nine, ten.

Q Total.

A I don't recall without --

Q You mean in all of these premises there were eight or nine or ten boxes of eight millimeter film?

A Which premises are you talking about, sir?

Q 210 West 42nd Street, East Coast Cinematics property.

A I don't think there were more than ten, twelve rolls of film there.

Q Right, and they were all on the table?

A Yes.

Q Could there have been more than ten?

A Yes, there could have been.

Q Could there have been more than 20?

A I don't recall how many films there were there, sir.

Q Could there have been more than twenty-five?

A I said I don't recall the numbers.

Q Could there have been ten thousand?

MR. LEVITT: Objection, your Honor.

THE COURT: He's told you three times.

MR. KASSNER: I'm trying to get --

THE COURT: He's told you three times he does not know, so going up to 25,000 isn't very helpful, is it?

MR. KASSNER: If he does not have the vaguest idea --

THE COURT: Next question.

BY MR. KASSNER:

Q How many films did you look at?

A I looked at the one on the machine, which was "Sex Nurse."

Q You mean you looked through the machine?

A No, sir, as I recall there was a leader on that film which said "Sex Nurse" on it, and then --

Q You had to go over to the machine and look at the leader?

A Well, I was standing at the table. The machine is attached to the table. You don't have to go over any place. It's right in front of you.

Q So you looked on the machine and you looked at the film and you looked at the leader of the film, and you determined that the name "Sex Nurse" was on the leader of the film?

A Yes.

Q "Sex Nurse" was not in the box, right?

A No, sir, I don't think so.

Q "Sex Nurse", that was the only copy of "Sex Nurse" you found on the premises; is that correct?

A I don't recall, sir.

Q You mean you could have found any number of that film on the boxes of film of "Sex Nurse"?

A I don't recall if there was another copy of it there or that was the only copy, sir.

Q How many did you seize?

A As I said before, there was ten or twelve rolls of film there. I'm not quite sure how many we seized, sir.

Q There were ten or twelve rolls of film in the premises and you don't remember how many you seized; is that correct?

A That's correct.

Q How many different titles were there?

A Well, there was three titles.

Q Only three titles?

A That's all I recall, sir, three titles.

Q So there were three titles and ten or twelve pieces of those three titles?

A Yes.

Q Each box was marked with a name; is that correct?

A Yes.

Q Well, were you willing to take the word of the box for the name of the film in the box or did you look in the box?

A I believe that I looked -- I'm sure I looked in each box, sir.

Q You looked in each box and you held each film up to the light; is that correct?

A At least the leader of it, sir.

Q The leader. So you're willing to take the leader's word for what was in the box; is that correct?

A Yes. Not on the box, sir, what was in that roll of film.

Q Which is what?

A Which was what was on that roll of film. Not what was on the box.

Q Okay, right.

Had "Sex Nurse" been determined to be obscene after an adversary hearing?

A I don't believe so, sir.

Q Had any of the three films been determined to be obscene after an adversary hearing?

A Not that I know of, sir.

Q Now, you state that you brought the films from the store to Judge Weiss ; is that correct?

A That's correct, sir.

Q You took these three films, one I assume, one print of each of the three films, and you brought them to Judge Weiss, and Judge Weiss looked at them and then he issued a warrant; is that correct?

A I think Judge Weiss looked at two of them, sir.

Q Two of them?

A Yes.

Q Which two did he look at?

A "Superman" and "Piss on Susan."

Q Why didn't you bring him the third one from the store as well?

A Most likely did, sir.

Q You brought all three from the store to Judge Weiss?

A Yes.

Q Then Judge Weiss looked at them and he issued the warrant to search the store; is that correct?

A Yes.

Q I'm curious to know, Detective Gray, if you had already seized the print, sufficiently to bring them to a judge, why did you have to get the warrant from the judge to seize the prints?

A That would be the procedure.

Q You mean first you seize and then you get the warrant?

A No, I didn't seize them, sir. I took them with me. There is a difference.

Q I understand. There is a difference I will grant that.

A I didn't seize them.

Q You take them. Other policemen seize them.

A No, sir, there were policemen still on the premises.

Q Okay, then we have got that clear. You had already taken the prints, brought them to Judge Weiss, then Judge Weiss gave you a warrant to seize the prints. Okay.

Where were you on December 29, 1971?

A Where was I on the 29th?

Q Yes.

A I don't know, sir.

Q You don't know? Well, were you with Judge Haft on the 29th of December, 1971?

A I most likely was.

Q What do you mean, you most likely were?

Q I most likely was. I believe there was an affidavit indicating I was. I don't have my records here.

Q The affidavit does not indicate that you were.

A I think the affidavit states that my name is on

the top of it, and if my name is on the top of it, I was there, because I had to sign it.

Q The affidavit does not say you were with Judge Haft on December 29, 1971. I'm asking you where you were on December 29, 1971?

THE COURT: Do you remember where you were December 29, 1971?

THE WITNESS: No, sir, but I do have records that we'll produce.

THE COURT: He doesn't know.

BY MR. KASSNER:

Q Okay. Did you have a list at this time called a deeming list? On January 27, 1972 did you have a list which you called a deeming list or some sort of name?

A No, sir.

Q Did the Police Department of the City of New York have a list of books and films which members of the Police Department felt free to seize whenever they saw it and whenever they saw it in any bookstore or film store in the City of New York?

A There was a list circulating. I never used that list, and I never came in contact with it, sir.

Q You never used the list or came in contact with it?

A No, sir, I never did.

Q Just your fellow officers in the Public Morals Division, they were the one who used it?

A No, sir, those in the Division used it, I believe.

Q Well, do you remember the procedure that would be followed with that list?

A No, sir.

THE COURT: What difference does it make? He says he never saw it nor came in contact with it.

Q When the film "Sex Nurse" was allegedly deemed obscene by Judge Haft, were you the one who brought the film to him?

A I'm not sure, sir.

Q Were you there when he deemed it obscene?

A I'm not sure, sir.

Q Isn't it a fact that that was one of the films on your list that you say you never saw?

A No, sir.

MR. LEVITT: Objection.

THE COURT: Now come on.

Q So you don't know whether you were there when Judge Haft deemed the film obscene?

A No.

Q Do you know if Judge Haft issued a warrant for the seizure of the film on December 29, 1971, the film "Sex Nurse",

which he then deemed obscene and in the version that was presented to him?

A No, sir.

Q And if Judge Haft had issued a warrant for the seizure of that film on December 29, 1971, when would that warrant have expired?

MR. LEVITT: Objection, your Honor.

THE COURT: Overruled.

A The warrant would have expired within ten days, but that would have nothing to do with whether the film was obscene or not.

Q Well, did Judge Haft's determination have anything to do with whether the film was obscene or not?

THE COURT: You are arguing with this man about something he says he has no knowledge of.

MR. KASSNER: Yes, your Honor. When he just stated some knowledge.

THE COURT: I'm sorry. He only gave his knowledge of when the warrant expires. That's matter for law I assume.

Q You say that Mr. Sainthill invited you into the basement?

A Yes, sir.

Q For what purpose did he invite you into the basement?

A To impress upon me the fact that that was not a portion of the store.

Q How would the basement impress you with that fact any more than the premises in which he was already?

THE COURT: You have to ask Sainthill that question, don't you?

MR. KASSNER: I withdraw it.

BY MR. KASSNER:

Q Did he tell you why the basement would apprise you of the status of East Coast Cinematics, Inc. in that premises any more than the place that you found him in?

MR. LEVITT: Objection, hearsay.

THE COURT: He says Sainthill is going to be a witness. I will take it.

A I'm sorry.

Q What was there about the basement that would convince you?

A I have no idea. I didn't question him about that, sir. I just followed him.

Q What did you find in the basement?

A I didn't find anything. I observed a large number of peep machines. I was -- the office door was opened up and I was shown the inside of a door with -- I was shown the inside of a room that had a lot of projectors in it, a lot of

tools, a lot of equipment.

Q But you didn't find any film there, did you?

A I think there was some film there,but I didn't look at it at that time.

Q You didn't look at the film downstairs?

A No, sir.

Q How much film was downstairs?

A I have no idea.

Q Were you aware that the film that was processed on that machine was processed for more than one film exhibitor or distributor in the City of New York?

MR. LEVITT: Objection.

THE COURT: I don't know what that means.

Q Were you aware that the film that went through this coating machine did not merely belong to East Coast Cinematics, Inc. but belonged to a number of people who utilized the facilites of East Coast Cinematics, Inc. to coat their eight millimeter film so it would pass easily through cartridges?

MR. LEVITT: I object, your Honor.

THE COURT: If he knows.

A No, sir, I didn't know that at all.

Q Was there any reason for you to believe that the film you found there that was being processed in that machine

belonged to East Coast Cinematics, Inc.?

A Yes, sir.

Q You believed that?

A Yes, sir.

Q You believed it at that time?

A At that time --

Q When you entered the premises at 210 West 42nd Street?

A No, when I first entered the premises I didn't know who owned it.

Q But when you found the film, did you believe it belonged to them?

A No, sir.

Q When did you become convinced that this film belonged to East Coast Cinematics?

A At a much later date, sir.

Q At a later date?

A Later time, yes, sir.

THE COURT: How much later?

Q How much later?

A I think it was sometime during that evening, your Honor.

THE COURT: Sometime during that evening.

Q What during that evening convinced you of that fact?

A I don't recall. Other than the fact that Mr. Sainthill and Mr. Jones had indicated that they, in fact, work for East Coast.

Q And you believed them?

A Not immediately, sir, quite a time later, sir.

Q When you saw that machine for the first time, you knew what it was, didn't you?

A When I saw it for the first time?

Q On January 27, 1972 in the premises of East Coast Cinematics at 210 West 42nd Street.

THE COURT: Did you know it was a coating machine when you walked into that room?

THE WITNESS: After looking at it, yes, I did.

Q Then you knew that that was not a processing lab for film; is that correct?

A That's in fact part of a processing machinery, yes, sir.

Q It didn't develop film, did it?

A No, sir.

Q It didn't edit film did it?

A No, sir.

Q It took film that had already been completed and maybe film that had already been used on numerous occasions, and coated it so that the film would move through the cartridge

more smoothly; is that correct?

A Yes, sir.

Q What was there about this machine and these premises that gave you the impression that East Coast Cinematics, Inc. was in the business of wholesaling obscene material?

A The very fact that they were using this type of machinery. The very essence of the number of machines downstairs. The films that were on the table, the film that was on the machine.

Q The ten or twelve rolls of film in the premises?

A Yes.

Q At the time that you entered these premises, did you know all of the locations of Mr. Hodas' peep shows in the City of New York?

A No, sir, I did not.

Q Did you know most of them?

A No, sir.

Q You didn't know anything about it? You had no idea, being on the Vice Squad for how many years at that time?

A I guess five years.

Q Five years, who owned these machines on 42nd Street?

A No.

Q Now on television that evening, did you see the interview of your partner, Sgt. Horman, in which he stated

there was a reproduction laboratory at 210 West 42nd Street that they had just discovered?

MR. LEVITT: Objection, your Honor. I don't see the relevance of this.

THE COURT: Sustained.

Q If I told you that this shellacking machine, as you call it, which you say was commonly used in the industry, was a custom-made unique item that was present nowhere else in the world at the time except in the rear of 210 West 42nd Street, would you say that's incredible because you had seen many before on numerous occasions?

A I didn't say --

THE COURT: First of all, he specifically denied that he had seen it on numerous occasions when you asked him the question 20 minutes ago.

MR. KASSNER: Your Honor, his direct testimony was commonly used in the industry to shellac films.

THE COURT: You are saying he saw it on numerous occasions. You have asked him that question on cross-examination 20 minutes ago, and he told you, no, he had not seen it on numerous occasions.

BY MR. KASSNER:

Q Had you ever seen this type of machine before in your life?

A I have seen shellac machines used to shellac on other occasions, yes, sir.

Q Before January 27, 1972?

A Yes, sir.

Q Would you state where you had seen it?

A A lab in Brooklyn, Frank DeCarico's lab where a seizure was made at, I have seen them at one of the premises owned by Mr. Lou Sax.

Q This is prior to January 27, 1972?

A Yes, sir.

Q When did D.A. Jacobs arrive at the scene?

A I don't know, sir.

Q You were not there?

A I may not have been, sir.

Q You may? You may or may not have been and if you were, you don't know when he got there?

A That's right, sir.

Q Where were you when D.A. Jacobs got there if you weren't there?

A I don't know.

THE COURT: Next question.

Q Did you speak to D.A. Jacobs?

A Yes, sir, there came a time when I spoke to him.

Q Then you left the store with three reels of film

and you went to Judge Weiss. How did Judge Weiss and you view those three reels of eight millimeter film?

A On a projector.

Q You brought a projector with you?

A I don't know whether I brought it with me or stopped at my office and picked it up.

MR. KASSNER: Your Honor, marked over here as Exhibit 4 is the warrant for the search of 210, the East Coast Cinematics premises. I would like to offer it in evidence.

MR. LEVITT: Objection.

THE COURT: What?

MR. LEVITT: Objection, your Honor.

THE COURT: Why?

MR. LEVITT: That warrant is irrelevant to the question here as to the admissibility of the records seized at 113.

THE COURT: At 113?

MR. KASSNER: If your Honor please, I am claiming that there were repetitive bad seizures all of which yielded fruits which subjected 113 to seizure.

THE COURT: All right.

MR. LEVITT: Your Honor, the witness has already testified that the affidavit for that warrant and the affidavit

for warrant of 113 were simultaneously presented and warrants were issued at the same time. Therefore, that affidavit and the warrant that obtained therefrom could not in any way have been used to gain evidence for the warrant of 113.

THE COURT: I will take it. You can argue that

(Defendant Exhibit A received in evidence.)

THE COURT: Go ahead.

MR. KASSNER:

Q Did you search that premises, 210 West 42nd Street, the East Coast Cinematics part of the premises?

A At what point, sir?

Q After you got the warrant.

A Yes, sir.

Q After you got the warrant, you went back and you searched and you seized again; is that correct?

A No, I went back and made a seizure. I didn't seize again.

Q You said you had already seized --

THE COURT: No, he specifically told you he had not seized.

Q You had already taken three pr ts.

THE COURT: Right.

A To a judge.

Q To a judge, that's correct.

Q Right.

THE COURT: He said he seized pursuant to the warrant. He didn't again seize.

BY MR. KASSNER:

Q You had already viewed the three prints and taken the three prints to a judge, right?

Did you bring these prints back to the store?

A I most likely still had them with me, yes.

Q You brought them back to the store?

A Most likely.

Q Then you seized them pursuant to the warrant; is that correct?

A You're talking about those particular?

Q Yes, those three prints.

THE COURT: The three you took down to Judge Weiss.

A I don't know if I seized them pursuant to the warrant.

THE COURT: He just had them in his pocket. Next question.

Q Do you recall what the warrant told you you could take?

A It says the above three films.

Q That's what it says, the above three films, right?

A Yes, sir.

Q What did you, in fact, take pursuant to that warrant?

A What did I, in fact, seize? I don't recall what I seized, sir.

THE COURT: Is there an inventory around?

MR. KASSNER: Yes, I do, your Honor.

Q I show you this document.

(Document handed to witness.)

A Yes, sir.

Q Is that the return on that warrant?

A Yes, sir; it is.

MR. KASSNER: I would like to offer it as evidence, your Honor.

THE COURT: Any objection?

MR. LEVITT: No objection.

THE COURT: All right.

(Defendant Exhibit B received in evidence.)

Q You noticed that the judge in his warrant told you to seize the three prints of the film that he had already seen; is that correct?

MR. LEVITT: Objection, your Honor, that's not what the warrant says.

THE COURT: The warrant speaks for itself.

Q Was there anything in that warrant that authorized you to seize two certificates from the State of New York?

A No, sir.

Q Is there anything in that warrant that authorized you to seize one card with the store routes on it?

A No, sir.

Q Was there anything in that warrant that authorized you to seize one book entitled "Social Security Time Book"?

A Not that I see, sir.

Q Was there anything in that warrant that authorized you to seize daily reminder book?

A No, sir.

Q Or 16 yellow slips of paper?

A No, sir.

Q Was there anything in that warrant that authorized you to take out three empty boxes of film?

A No, sir.

Q Did you take out every piece of film at 210 pursuant to this search warrant?

A No, sir, I did not.

Q What did you leave?

A Films which had not been deemed, sir.

Q Films which had not been deemed?

A Yes, sir.

Q You mean there were other films in the premises besides these three films?

A Yes, sir.

Q Had "Superman" been deemed before Judge Weiss?

A No, sir.

Q Had your "Piss on Susan" film been deemed before Judge Weiss?

A I don't believe so, sir.

Q Why did you select these two films to take to Judge Weiss and not other films in the premises?

A Because the others were obviously not of the hard-core quality, sir.

Q You exercised your judgment?

A No, sir.

Q You made an ad hoc determination on the spot of what you thought was obscene and what was not obscene, you took what you thought was obscene and you took it to a judge; is that right?

A No, sir.

Q That's not right?

A No, sir.

Q When a judge deems a film obscene, does that authorize you to take more than one print of the film?

A Yes, sir.

Q If there are three prints of the film, does it authorize you to take three prints of the film?

A Yes, sir.

Q If there are ten prints of the film, does it authorize you to take ten prints of the film?

MR. LEVITT: Objection, your Honor, he's asking for a conclusion of law.

MR. KASSNER: I'm asking for his procedure, your Honor, and his understanding.

THE COURT: I gather if he's allowed to seize, he's allowed to seize all the film with that title.

MR. KASSNER: That's exactly not, your Honor.

THE COURT: Then prove it to me some other way. Next question.

MR. KASSNER: I have a brief in that will attempt to prove it.

THE COURT: All right. Next question.

BY MR. KASSNER:

Q What is the purpose of the deeming? What is your understanding the purpose of a judge seeing a film and deeming a film obscene?

A That there is belief that there is reasonable cause to believe that that film is in fact obscene and in violation of our statute.

Q Would that authorize you to go into a warehouse and seize 10,000 prints of that film which the judge had deemed obscene?

MR. LEVITT: Objection, your Honor.

THE COURT: I will let him answer.

A Just any warehouse? Just walk into a warehouse?

Q No, this particular warehouse. The judge gives you a warrant that says"I want you to seize 10,000 prints of film of this film which I deem obscene."

A Absolutely not.

Q It wouldn't authorize it.

A Absolutely not.

Q What authorized you to take three reels of film entitled "Superman"?

MR. LEVITT: Objection, your Honor.

Q What authorized you to take more than one reel of film for pupose of a prosecution initiated as a result of the deeming?

A Normally, we usually take six rolls of film to show that it was not just a factory where a person had one or two rolls of film.

Q The reason you take the six rolls of film is because you have a presumption of wholesaling for six rolls of film; is that correct?

A Yes, sir.

Q Is there any reason ever to take more than six rolls of film?

MR. LEVITT: Objection, your Honor.

THE COURT: He can say. He's the officer who executes the warrant.

MR. LEVITT: He's asking for a conclusion based upon fact not presented. Is there ever a reason was the question.

THE COURT: I will take it.

A Yes.

Q What reason?

A You may have a situation where an adversary hearing is given; where a -- the film is brought to a judge and he offers an adversary hearing before the entire seizure may be made. It's commonly referred to --

Q You are talking about a seizure after an adversary hearing. I'm talking about a seizure before an adversary hearing. I'm talking about the deeming seizure.

A You had asked me was there ever, sir?

Q Is there ever a reason, a legitimate reason for seizing more than six prints of a film prior to an adversary hearing and subsequent to a deeming?

A I don't think so, sir.

Q Is it a fact that you took three reels of a film entitled "Superman"? Is there any reason for the extra two prints being taken?

A Yes, sir.

Q Did that establish the wholesaling presumption of six prints?

A No, sir.

Q Then what was the reason for the extra two?

A I don't recall why the other two were seized, sir.

Q Isn't it a fact you took out all the prints of these films in the premises?

A I don't recall whether we took all of them, if it was under six then we took all of them.

Q Isn't it a fact that you conducted what the law calls a massive seizure?

MR. LEVITT: Objection, your Honor.

THE COURT: Massive seizure? Next question.

Q Here you say you took eight rolls of "Superman"; is that correct?

MR. LEVITT: I object, your Honor. I don't know what he's referring to.

THE COURT: Show it to him.

MR. KASSNER: He has it right in front of him, Judge. I don't have to show it to him.

MR. LEVITT: I don't know what you are referring to, sir.

MR. KASSNER: There is a film known as "Superman".

THE COURT: What are you reading from?

MR. KASSNER: Reading from the return.

THE COURT: Tell the Assistant. He likes to know what is going on here and the record would like to know what is going on here.

BY MR. KASSNER:

Q If you look at Item 2 on your return, you will find that you took two --

THE COURT: The return being Exhibit B.

Q -- you took two reels of "Superman" under Item 2, and you took six reels of "Superman" under Item 4. That makes eight reels of "Superman".

You just said before that there is never an excuse for taking more than six prints on a deeming and prior to an adversary hearing. Why did you do it?

A As I read it from here, sir, this refreshes my recollection, and indicates that I removed six reels from downstairs, not upstairs, sir.

Q And two reels from upstairs?

A Yes, sir.

Q What is the distinction you are drawing?

A The distinction is that it's two different areas. I was not sure that at that time we had totally established who owned what at that point, sir.

Q You told me that there was no door between upstairs and downstairs before. Did you not?

A No, sir.

Q You didn't say that between the upstairs and the downstairs there was no door, you just went down a flight of stairs?

A Went down a flight of stairs and I said that he opened the door to another office at the far end, sir, and in that office, after he opened the door, were a number of machines and other items, sir.

MR. KASSNER: The record will show what you said, Detective Gray.

THE WITNESS: I am sure it will, sir.

Q Now, you stated that you took a film called "Piss on Susan" to Judge Weiss to look at, and he deemed it obscene?

A Yes.

Q Where is "Piss on Susan" on this return?

A I don't see it in here, sir.

Q You mean you took it home?

A No, sir.

Q You mean the Judge deemed it obscene and you still

didn't seize it?

A I would have to check on that,sir. I don't know if there were vouchered under the fact they were shown to the judge and at that point they were court exhibits. I'm not sure of that.

Q Court exhibits?

A Yes, sir, anything I would give to a judge would be an exhibit, sir.

Q You mean this was never seized, that print of "Piss on Susan" was never seized, it became a court exhibit?

A I said I would have to check, sir. I'm not clear on where that copy went, sir.

Q You know you took it, right, you didn't seize it, you took it.

THE COURT: Took it and took it to the judge. He does not know whether it was vouchered in as an exhibit at the judge's order or what. Next question.

Q Let's talk about exhibits. Did you arrest Mr. Sainthill and Mr. Jones?

A Yes, sir.

Q Did you put them in jail?

A They went to the station house, yes, sir.

Q Did you bring them before a magistrate?

A Yes, sir.

Q And what happened to the case?

MR. LEVITT: Objection, your Honor.

THE COURT: Sustained.

MR. KASSNER: We are talking about exhibits now. I don't know what it's an exhibit in, your Honor.

THE COURT: You know what the issue in this case is. It has nothing to do with Sainthill being brought before a magistrate.

Q Prior to January 27, 1972, did you ever see the film "Sex Nurse" in its entirety?

A Before when, sir?

Q January 27, 1972.

A I don't recall, sir.

Q Did you say before, before you just started with these two prints from downstairs, that you took no prints from downstairs?

A I said I had no recollection of it, sir. This is a thing that occurred in 1972, sir.

Q You didn't read your affidavits before you came here today?

A I looked over them, yes, sir.

Q Then you say that it was the presence of numerous coin-operated film machines at 210 West 42nd Street?

A Yes, sir.

Q Plus the films, the ten or twelve films that you saw there?

A Yes, sir.

Q That induced you to believe that there was a wholesale obscenity ring going on; is that correct?

A Yes, sir.

Q Is there anything unique about these machines that makes them incapable of playing anything other than obscene films?

A No, sir.

Q In fact, could these machines play any eight millimeter film of any subject?

A Yes, sir.

Q What was your answer?

A Yes, sir. Sorry.

Q So there was nothing about the machines that induced you to believe there was a wholesale obscenity business going on; is that correct?

A No, sir.

Q As to the film coating machine in the basement?

A Excuse me, the answer to that is that I think I answered the incorrectly. Could you give me that other question again, sir?

Q The assistant district attorney will help you.

THE COURT: Oh, no, no. He's going to correct it right now if he wants to.

MR. KASSNER: Then let him.

THE COURT: He wants you to give him the question again.

MR. KASSNER: Would you read him the question and answer read back?

(Record read.)

A The answer to that is yes, those particular machines do denote a particular type of use.

Q How?

A Well, the majority at that point and I think even to this day, the majority of the Times Square bookstores do not show anything but a certain type of film in that, and it is not a film that is anything but obscene in content.

Q You mean every film that is shown in that machine is obscene all over Times Square?

A Not ever machine, most machines. If in that type of machine, yes, sir.

Q You are saying this business goes on on a daily basis in every booksore in Times Square?

THE COURT: Henever said that.

Q Is that a fact, that on a daily basis every bookstore in Times Square is showing obscene films, violation of

the law? Is that what you are saying?

MR. LEVITT: Objection, your Honor.

THE COURT: Sustained.

BY MR. KASSNER:

Q Are there not places where coins are thrown into machines to show Shirley Temple movies to kiddies?

THE COURT: Where?

MR. KASSNER: Throughout the City of New York. Throughout the City of New York.

A I don't know of any, sir.

Q You have never seen any in Coney Island, at any penny arcades?

A I have seen little penny machines with a flipping card. That has nothing to do with it, no, sir.

Q You have never seen motion picture machines where you throw coins in and see segments of old films?

A No, sir, I have not.

Q So the presence of a number of machines by themselves indicates to you that there was a wholesaling obscenity business going on?

A What with the film, the type of machine, the type of films that were being used at that time, yes, sir.

Q You were talking about the film. We had one film which you claim in your affidavit was ruled probably obscene

by a judge. Okay?

On December 29, 1971. Which film you don't recall ever having seen at that time, and which judge you don't recall ever having seen at that time, and that you don't know whether you were present when he deemed it obscene. Okay?

Then we have two pictures which you state were not deemed obscene on January 27, 1972.

Then we have you taking the three pictures out of the premises to a judge, and showing them to a judge and saying, "I believe these films are obscene." Right? And the judge read them and he said, "Yes, they are probably obscene," and he gave you a warrant to seize the three films. Okay? That's what we have so far.

And on the basis of this, you say there was a wholesaling obscenity ring going on?

THE COURT: No, he didn't say that. Sorry, you misquoted his testimony.

MR. KASSNER: Well, Judge, that was my understanding of his testimony.

THE COURT: That's what you would like to have the testimony be, but he's gone beyond that. Right before you just summarized what you think the testimony is, he said more than you have put in your question.

MR. KASSNER: He said these machines are only used

for obscene means.

THE COURT: He didn't say that.

MR. KASSNER: Then I don't know what he said.

THE COURT: Read it back to him,or you stay here, and Mr. Reporter,would you read back the question -- the answer that the witness gave to show that your summarization is incorrect.

I will see you at two o'clock.

(Luncheon recess.)

AFTERNOON SESSION

May 19, 1975
2:00 p.m.

(Hearing continued.)

D O N A L D G R A Y, resumed.

CROSS-EXAMINATION CONTINUED

BY MR. KASSNER:

Q Detective Gray, how long were you in the East Coast premises of 210 West 42nd Street before you started looking at the names on the boxes of film that were on the table?

A I don't remember, sir.

Q Could you approximate it?

A I have no recollection. I walked downstairs with Mr. Sainthill, walked back. We didn't walk quickly, we didn't walk hurriedly. We walked upstairs. I took Mr. Sainthill outside. I have no idea as far as reference of time.

Q In other words, when you first opened the door, opened the partially opened door to 210 West 42nd Street's East Coast Cinematics area, and walked in, you met Mr. Sainthill, you talked to him a while, you then went downstairs, you looked around downstairs, you came upstairs, you went outside with Mr. Sainthill, you took him out into the street or into the bookstore portion.

A Into 210.

Q You took him into the bookstore?

A Well, it's all 210.

Q We're trying to separate the two premises, the East Coast Cinematics' premises and the bookstore premises.

THE COURT: Is it agreed here that there is a differentiation between the two?

MR. KASSNER: Well --

THE COURT: You keep assuming it, but I gather that at the time he went in there he had no idea they were separate.

MR. KASSNER: He said there came a time he learned they were separate.

THE COURT: That's much later on.

MR. KASSNER: As of today he knows they are separate. I'm basing it on today's knowledge.

THE COURT: You are? As long as the record shows this is not an assumption of fact that existed at the time, it's all right with me.

BY MR. KASSNER:

Q I'm basing it on your knowledge today that they were two separate premises, one of East Coast Cinematics and the other of a bookstore owned by somebody else. You know that today, don't you?

A I'm not sure that I do know that, sir.

Q In other words, you think that -- is the rear portion?

A I beg your pardon, excuse me.

Q Do you know that the rear portion of that premises at 210 was owned by East Coast Cinematics or leased by East Coast Cinematics, Inc.?

MR. LEVITT: Your Honor --

Q Do you know that today?

A Yes, sir.

Q Now as to the front, you have no idea today who owned that premises?

A No, sir.

Q So let's refer to that front as the bookstore premises, and anytime I refer to East Coast Cinematics, it means that rear workshop area and basement; okay? Is that right?

A Yes, sir.

Q Okay.

A I don't agree or disagree with you.

THE COURT: No, he wants to know, do you understand that that's what he means when he's putting the question to you.

THE WITNESS: Yes, sir, your Honor.

BY MR. KASSNER:

Q So before you conducted a search of the East Coast Cinematic premises, you spent some time speaking to Mr. Sainthill in the premises, going downstairs with Mr. Sainthill, coming up and walking with him out into the bookstore area?

A Yes.

Q Did that take approximately ten or fifteen minutes?

A I have no idea how long it took, sir.

Q All right. When did you go back into the East Coast Cinematics' premises to conduct a search?

A I did not conduct a search in there, sir.

Q You didn't?

A The things were laying completely open and above-board. I never searched those premises, sir.

Q Then maybe I should not use the word "search."

When did you go back into the East Coast Cinematics' premises and start reading the names on boxes?

A I don't know when I noticed the names on the boxes, sir. I might have noticed them before I went down, as I came up. I don't recall, sir.

Q Well, about how high are the letters on those boxes?

A The width of the side of the box.

Q About how much is that?

A Oh, maybe an inch.

Q An inch high?

A Half inch, I'm not sure. I'd have to have one of the boxes to measure it, sir.

Q The first time you noticed the names on the boxes, were you holding the boxes in your hand and looking at them?

A I don't recall, sir.

Q Were all of these ten or twelve boxes on a table?

A Yes, sir, they were.

Q Next to the film coating machine?

A Well, they were on the table just to the front of the machine or to the side of it.

Q When you went into the premises, did you conduct--into the East Coast Cinematics' premises, did you conduct a search for books and records?

A At that time, no, sir.

Q Did you conduct a search for books like "Libido"?

A Oh, yes, sir, I was looking for anything that would pertain to that search warrant, no matter where it might be found, sir.

Q Could "Libido" have been in one of these boxes that houses the eight millimeter film?

A No, sir.

Q You stated before that you were acquainted with these boxes and you knew what was in them before you opened

them up; is that correct?

A Yes, sir.

Q You knew there was film in them, right?

A Yes, sir.

Q And not books and records of the bookstore in front; is that correct?

A That's correct, sir.

Q But nonetheless you opened up these boxes?

A After determining the name on the outside, yes, sir.

Q First you had to look at the name on the outside?

A Yes.

Q You picked it up, you looked at the name?

A No, I didn't say that, sir.

Q Then what did you do?

A I may have been able to see the name just laying there. I didn't necessarily --

THE COURT: You asked him before whether he picked it up. He said before he didn't know whether he picked it up and looked at it or saw the name on the box as the box was laying on the table.

Q When you saw the name "Superman" on a box, what caused you to open that box?

THE COURT: The name "Superman," I assume; not

Shirley Temple.

MR. KASSNER: That the answer to the question?

THE COURT: Obviously. Next question.

BY MR. KASSNER:

Q Had "Superman" ever been found obscene after an adversary hearing in New York County prior to that date that you know of?

A I'm not sure.

Q Before you testified it hadn't.

A I'm not sure.

Q But at that time you didn't know that "Superman" had ever been found obscene prior to that date or had ever been deemed to be obscene; is that correct?

A I'm not sure, sir.

Q You mean as of that date you might have thought it was?

A I may have been informed so. I don't recall. There is a lot of things going on at that particular time; and --

Q In order to determine whether there was film in that box, you had to open the box; is that correct?

A In some cases, yes, sir.

Q In what cases no?

A I think there was one on the reel, sir. There

was one on the machine.

Q That was your statement about "Sex Nurse" was on the machine?

A Yes, sir, that was my best recollection.

Q That was not in a box?

A No, sir, I don't believe so.

Q So the print of "Sex Nurse" that you were describing, and that you brought to Judge -- to Judge Weiss had been on the machine and you removed it from the machine and took it to Judge Weiss; is that correct?

A I'm not sure whether I removed that off the machine and took it to Judge Weiss, sir.

Q You mean he may not have seen that film?

A It's possible he may not have seen that film.

Q So he ordered the seizure of a film which he hadn't seen, "Sex Nurse"?

A He saw a copy of the film or the film, sir.

Q But as to "Superman" you opened all the boxes, correct?

A I don't know whether I opened all the boxes or not, sir.

Q You said they were in boxes.

A Yes, sir.

Q Didn't you look at them?

A I looked at some of them, sir.

Q You looked at some of them?

A Yes, sir.

Q You held them up to the light?

A I held some up to the light, yes, sir.

Q That was not a search, that was a look?

A Certainly, sir.

Q As to "Piss on Susan", where we don't know where it is, that too you looked up at the light also; is that right?

A I believe so, yes, sir.

Q Have you been able to determine where it was in lunch time?

A No, sir, I have not. I didn't make an effort to, sir.

Q In the lunch time, did you make an effort to determine whether the pictures that were taken by the police at that time of the premises include a picture of the door into the East Coast Premises?

A No, sir, I was not under any impression that I was directed to do that, sir.

Q Nobody directed you to do that. Now as to your application for 113 West 42nd Street --

A Yes, sir.

Q -- you state that you found a box of film labeled "Sex Nurse," and there was a snapshot of a still of the movie; is that correct?

A Yes, sir.

Q And you stated that the above movie, "Sex Nurse," had been deemed obscene by Judge Robert Haft on December 29, 1971. Were you there when Judge Haft ruled that film obscene, probable cause that it was obscene?

A I do not know, sir.

Q You don't know if you were there?

A No, sir, I do not.

Q Do you know how you knew that Judge Robert Haft ruled that film obscene or presumptively probably obscene?

A Yes, sir, most likely one of the members of my unit.

Q One of the members of your unit most likely told you?

A Yes, sir.

Q You mean you had no personal knowledge?

A No, sir. To my best recollection, I have no personal knowledge.

Q You didn't state this as the information of an informant in your affidavit for the search warrant, did you?

A No, sir.

Q You stated it on the basis of your own personal knowledge. Now when you applied for these warrants, did you have a long conversation with Judge Weiss?

A I don't recall.

Q Did he ask you the question I asked you now, whether you were present when Judge Haft ruled the film obscene or deemed it obscene?

A I don't recall whether he did or not.

Q Do you recall having any conversation with the judge? Did he ask you any questions?

A He may have well have, sir, I do not know.

Q You don't recall?

A No, sir.

Q Now, in connection with this application for a warrant, it does not say here that you submitted any other films for adjudication of obscenity by Judge Weiss, does it?

A I don't know, sir. You have that in front of you.

(Document handed to witness.)

A No, sir, it does not say anything about that.

Q In this affidavit it does not even say that you had seen this film, "Sex Nurse," is that right?

A No, sir, it does not say that.

Q In this affidavit you can't even say there was a film in the box.

A Correct, sir.

Q In this affidavit, all you said was that you saw a box?

A Yes, sir.

Q With a name "Sex Nurse" on the box?

A Yes, sir.

Q And a still film on top of it?

A Right.

Q You didn't even say that you knew that still film was from the film "Sex Nurse"?

A Yes, sir, I did.

Q Where did you say that?

A Third paragraph down, "Sex Nurse" and that there was a snapshot of a still of it above said movie.

Q Well, you said you hadn't seen the film, "Sex Nurse".

A I said -- no, sir, I said I was not sure whether I saw it or not. I never said I did not see that film.

Q Now do you know whether you saw it or not?

A No, sir, I do not still know whether I saw it or not.

Q And you don't know whether you told Judge Haft that this information about this deeming, I mean Judge Weiss, that this information about this deeming was information

given to you by an informant or was your personal knowledge; you never discussed that with him?

A I don't know what was discussed with him, sir. There were other police officers with me also, as far as I remember.

Q We are dealing with your affidavit, which is the only affidavit for the application; is that correct?

A That's correct, but I might not have been there by myself, sir.

Q And you don't know what was said anyway?

A I don't recall what was said, no, sir.

Q All right.

At the time that you found this box that you referred to in this affidavit, was there anything to indicate that this box had a film in it which was to be used by East Coast Cinematics in any of its film projection equipment?

A No, sir.

Q What is it in this warrant that gave you reason to believe that a wholesaling obscenity business was being run by East Coast Cinematics?

MR. LEVITT: Objection, your Honor.

THE COURT: The warrant speaks for itself, doesn't it, the affidavit?

That's for me to determine.

Q Now, at the time you made out this affidavit, had you yet become convinced that East Coast Cinematics was the operator of that area of the premises in the back of the bookstore, the workshop, and the basement?

A As I said before, I'm not sure when that realization came.

Q Well, did it come before or after you made out this affidavit?

A I don't recall, sir. I had no way of ascertaining who owned what at that point, sir.

Q You say in paragraph three of your affidavit, "Based upon the foregoing reliable information, and upon my personal knowledge, there is probable cause to believe that such property, namely books and records of East Coast Cinematics, Inc. will reflect a peep show business using obscene movies in violation of Section 235.06 of the Penal Law at 113 West 42nd Street, New York City, 17 floor."

What is this personal knowledge you are speaking about?

A Which paragraph is that, sir?

A Paragraph three of the warrant, paragraph number three of the affidavit; of the affidavit.

MR. LEVITT: Mr. Kassner, excuse me. He does not have that affidavit.

Q Here is the affidavit.

A I was wondering. I didn't know what you were talking about.

Q Here is the affidavit, numbered paragraph three (handing to the witness).

A The basis on which I placed that was the fact that these two gentlemen indicated that.

Q You said "Based upon the foregoing reliable information," that's the two gentlemen. What is your personal knowledge part about it, "and upon my personal knowledge." What is the "and upon my personal knowledge"?

A The conversation I had with them, what I observed, sir.

Q You recited the markings; you recited your conversatons?

A Yes, sir.

Q What is your personal knowledge?

A That's my personal knowledge, sir.

Q Now, when you went up to 113 West 42nd Street, you broke down the door; is that correct?

A After knocking, yes, sir.

Q When did you go up there?

A I have no time recollection of going up there. It was -- it was getting dark, it was dark out when I went up.

Q It was getting dark or it was dark?

A My recollection, it was getting dark, sir.

Q So it was about seven or eight o'clock, six or seven o'clock.

THE COURT: In January?

MR. KASSNER: I'm asking.

THE COURT: Getting dark? Now come on, Mr. Kassner.

BY MR. KASSNER:

Q Could it have been at one o'clock a.m. on January 28, 1970?

A No, sir, it could not.

Q That was the second time or the first time?

A First time or second time what, sir?

Q When was the first time you hit that door?

A Only one time, sir.

Q You only came there once?

A Yes, sir. I only entered the premises through the door. I have been there to arrest somebody else that was there, but not in connection with this, sir.

Q You entered the premises when it was getting dark on January 27, 1972?

A Yes, sir, that's my recollection, sir.

Q You broke down the door at that time?

A Either I broke it down or someone that was with me.

Q You had a warrant with you at that time?

A Yes, sir, I did.

Q A warant issued by Judge Weiss?

A Yes, sir.

Q If I tell you that Judge Weiss signed the warrant for the search of 113 West 42nd Street at 10:05 p.m. on January 27, 1973 would you still say that you went in there when it was getting dark?

A Sure.

Q Then you went in before he signed the warrant; correct?

A No, sir.

Q What?

A No, sir. I used it as a time frame. It was getting dark. It wasn't in the middle of the afternoon.

Q On January of 1972, it was getting dark at ten o'clock at night?

A No, I didn't say that, sir.

Q When did you finally bring this warrant back to the place if it was signed at 10:05 p.m.?

A I would say I left here at twenty minutes after five and went up there.

Q Went up where?

A Where you just asked me, sir, up to the --

Q 113 West 42nd Street?

A No, I think I went to 210 first, didn't I, sir?

THE COURT: Wait a second. Mr. Gray, Mr. Kassner says that the warrant was signed by Judge Weiss at 10:05 p.m.

THE WITNESS: 10:05, sir? I thought he said five --

MR. KASSNER: No, I said 10:05 p.m.

THE COURT: 10:05 p.m. on January 27. The question put to you is when did you go up to the premises to execute the warrant.

A It would have to be after that time. Could I see that warrant, please?

Q Certainly. It's in evidence.

A It would have to have been after that time, sir. It would have to have been after ten o'clock.

Q You mean you didn't go in there when it was getting dark and then go out and get a warrant?

A No, sir, I never said that.

Q When you broke into 113 West 42nd Street, whenever that might be, on that date, January 27, 1973, how did you find the state of the office generally?

A I found things piled up on top of the desk. I saw things. I didn't find them. I saw them piled up on there. I was not by myself. There were other officers there.

Q You found papers in disarray?

A Yes, sir.

Q Did you find any large rooms with more than one desk in them?

A Yes, sir.

Q Did you find that offices didn't have doors on them?

A Yes, sir.

Q In other words, it was essentially one big place with partitions without doors?

A There were doorways. I don't recall whether the doors were open or whether they had doors hanging on them, sir.

Q In the course of your search, did you make a record of where you obtained each item seized from?

A No, sir, I did not.

Q You can't tell this Court from which particular place in this bunch of offices you took any of the material on your return?

A That's correct, sir.

Q Now, before going back for the second warrant for the search of 113 West 42nd Street, did you search the premises at 113 West 42nd Street?

A I did or brother officers did.

Q In other words, the search of 113 West 42nd Street was conducted pursuant to the first warrant, and then you

went and got the second warrant; is that correct?

A I'm not sure, sir.

Q You're not sure?

A I'm not sure of the progression of what portion of the search was conducted or was not conducted, sir.

Q I'm not saying that you stopped searching after you got your second warrant. I'm just saying you did a thorough search of the premises after the first warrant.

A No, sir, I did not remain on the premises, sir.

Q How long were you on the premises?

A Maybe 45 minutes to an hour. I had other things to do.

Q How many police officers were in the premises?

A Four.

Q And you were all searching --

A Five.

Q -- you were all searching those 45 minutes?

A I don't know what they were doing, sir. I came back later. They were still there.

Q Do you know what you were doing?

A Yes, sir.

Q What were you doing in the 45 minutes you were on the premises?

A I had looked at Mr. Hodas' desk, top of the desk;

looked around the office in general; and my recollection is that I left there to pick up evidence on other executed warrants.

Q On other what?

A Executed warrants. I executed a number of warrants that evening, sir.

Q Involved with my defendants?

A No, sir.

Q Now it became, when you reached the door, you knew that there were over half a dozen other corporations housed in that premises; is that correct? You stated there was a sign on the door?

A Right.

Q Right?

A Yes, sir.

Q Notwithstanding that fact, you didn't go and get another warrant to search as against these other corporations and entities, you went into the premises and started commencing the search at that point; is that correct?

MR. LEVITT: Objection, your Honor.

THE COURT: Sustained.

Q What did you do after you learned that in that office there were at least a half a dozen other entities housed?

MR. LEVITT: Objection, your Honor.

THE COURT: Sustained.

Q Did there come a time when you sought out Judge Weiss to get a warrant or another judge to get a warrant against other corporations housed in that premises?

MR. LEVITT: Objection, your Honor.

THE COURT: It's in the record already. Overruled. January 28.

A Yes, sir.

MR. KASSNER: I would like to get a time gap over here.

THE COURT: What time does the warrant show that it was issued?

MR. KASSNER: Well, we have some small problems with these things.

BY MR. KASSNER:

Q 2:35 p.m. on January 28, 1973. Is that when you got the warrant from Judge Solniker to search 113 West 42nd Street in connection with the other over half a dozen corporations?

A I obtained a warrant naming those corporations, sir.

Q When did you obtain that warrant?

THE COURT: When?

THE WITNESS: I believe it was the 28th, your Honor.

THE COURT: All right; what time?

THE WITNESS: I believe the lawyer indicated the late afternoon, two o'clock or something like that, 2:30.

Q 2:35 p.m.

A Yes, sir.

THE COURT: Is that what it says on there?

MR. KASSNER: That's what it says.

THE COURT: All right, go on.

BY MR. KASSNER:

Q Now why 2:35 p.m. that afternoon, had there been a thorough search made of those offices at 113 West 42nd street?

A I don't know, sir.

Q You had nothing to do with that search?

A Only peripherally, sir.

Q Only peripherally?

A Yes, sir.

Q What does peripherally mean?

THE COURT: Let's get Webster's dictionary.

Next question.

MR. KASSNER: I would like to know what he means.

THE COURT: Next question.

Q Were you connected with that search or weren't you connected with that search?

THE COURT: Yes, he stayed part of the time and he left to execute others so he does not know what the other four or five officers did.

Next question.

Q How many minutes between ten p.m. the night before and 2:35 p.m. the day after, how much time did you spend in 113 West 42nd Street?

A I have no idea. I'd say two to three hours.

Q Two, three hours.

When you were on those premises those two, three hours, how many other police officers were on those premises?

A Everybody that was there, sir.

Q Five police officers?

A Four, five police officers.

Q So at least you can testify that at least four or five police officers and yourself searched that premises for two or three hours before the issuance of the Solniker warrant at 2:35 p.m. the next day?

A I'm sorry, I didn't say I was searching at all, sir.

Q What were you doing in the premises?

A I was standing there.

Q How many of the other police officers were standing there?

A I don't know.

Q How many were searching and how many were standing?

A I have no idea, sir.

Q Before you went to get the Solniker warrant, what, if any, information did you glean at 113 West 42nd Street that led to your believe that these other corporations aside from East Coast Cinematics, Inc. was involved in the wholesale promotion and sale of obscene material?

MR. LEVITT: Objection, your Honor.

THE COURT: Overruled.

A There were a number of instances where I was told by other people at the premises that these corporations were owned by one company, one owner.

A You were told by other people at the premises. Who were these other people?

A I don't recall who it was, sir.

Q That these corporations were owned by one person?

A Yes, sir.

Q You're talking about Martin Hodas?

A Yes, sir.

Q And this led you to believe that they were all engaged in the business of wholesaling obscene material; is

that correct?

A Yes, sir.

Q This was the sole basis for that conclusion?

A No, plus what was found at 113 -- excuse me -- at 210.

Q Did you have any indication that anything was found at 210 belonged to these other corporations?

A Yes, Mr. Sainthill said they did.

Q Belonged to the other corporations and not to East Coast Cinematics?

A He indicated that -- well, I don't know whether he indicated that they belonged to the other corporations, sir.

Q So what gave you the impression that these other corporations were involved in the wholesaling of obscene material?

A What was placed in the warrant, number one.

Q What was placed in what warrant?

A The warrant right here, sir, in front of me.

Isn't there information indicating that the company was there at 113 West 42nd Street?

Q There was information to indicate that there were seven or more corporations. Nine corporations, eight, besides East Coast Cinematics, Inc., to which you already

had procured a warrant, housed in that office?

THE COURT: Are we trying to suppress on behalf of the other eight corporations, Mr. Kassner?

MR. KASSNER: No, your Honor. Your Honor ordered an evidentiary hearing. I assume that he ordered an evidentiary hearing because he wanted to find out what is true and what is untrue to the facts. I would assume that --

THE COURT: I would assume that two-and-a-half-hours of cross-examination you should have about completed, don't you?

MR. KASSNER: Well, if you Honor is telling me --

THE COURT: If searching cross-examination goes to length, you win. If you go to materiality and relevance, you lose.

Two-and-a-half hours is sufficient to take this witness over anything you have to take him over on credibility.

BY MR. KASSNER:

Q You stated in paragraph ten of your affidavit in support of the Solniker warrant for 113 West 42nd Street, "Deponent states that he believes all of the above corporations are being operated and controlled by Martin Hodas and East Coast Cinematics and deponent believes the books and records of the corporation reflect the use of obscene movies."

You also state in paragraph 9, "Deponent states

that he examined the books and records of all the above corporations, and that all corporations are involved in sexually orientated material, and that numerous books and records and papers bear no designation of corporate affiliation."

Did you find books and records which indicated that all of the corporations were involved in sexual orientated material?

A If that's what is down there, that is what was pointed out to me from the books that were taken, yes, sir.

Q This was before 2:35 p.m. on January 28th?

A Yes, sir.

Q Who pointed this out to you?

A I do not recall, sir.

Q But you state, "Deponent states that he examined the books and records for all the above corporations."

A Yes, sir, somebody shows me a book, I have examined it, haven't I, sir?

Q Did you removed from the premises virtually every single stitch of paper on the premises?

MR. LEVITT: Objection, your Honor.

THE COURT: The inventory speaks for itself, doesn't it?

MR. KASSNER: I'm asking what the inventory amounts

to.

Q Doesn't it amount to every single stitch of paper on the premises?

A No, sir.

Q Did you inspect the books and records that you took before you took them?

A Some of them I did, sir.

Q And some of them you didn't?

A No, sir.

Q You have listed on your inventory that you took six payroll books?

A Yes, sir.

Q How would payroll books indicate the wholesale operation -- the operation of a wholesale obscenity business?

A It would indicate ownership, who was working for the individual, what they were doing particularly. If we had independent information pertaining to a particular individual on those books, they would be important.

MR. KASSNER: I have no further questions.

THE COURT: Redirect?

MR. LEVITT: Briefly, your Honor.

xxx REDIRECT EXAMINATION

BY MR. LEVITT:

Q I direct your attention to Government's Exhibit 3,

the fifth paragraph thereof, Detective Gray, and ask that you take a moment and read it.

A Yes, sir.

Q Now Detective Gray, there has been a lot of discussion as to whether you seized the three films prior to the time you sought to obtain the second warrant, authorizing a search of premises at 210 West 42nd Street, whether you took the films or where you got the film from that you presented to Judge Weiss.

A Yes, sir.

Q Now Detective Gray, having read that paragraph I just pointed out to you of your affidavit marked as Government Exhibit 3, can you now better state, is your recollection refreshed as to where the films came from which you submitted to Judge Weiss?

MR. KASSNER: Objection, your Honor. He showed no confusion whatsoever on his direct -- on his cross-examination as to where the films came from. I think this is an attempt to impeach his own witness.

THE COURT: Overruled.

A Based on this paragraph, sir, it indicates that the films in question that were shown to the judge were obtained at two bookstores in the Times Square area.

Q So that these were not the films physically those

films which you saw at the bookstore; is that correct?

A That's correct, sir.

Q So that you didn't take any films out, am I correct, of the bookstore at the time that you first searched it pursuant to the first warrant?

A I believe we did, sir.

Q Turning to the last paragraph of that affidavit before the paragraph numbers 3, sir, I ask you to please examine that paragraph.

A Yes, sir.

Q Having examined that paragraph, sir are you now better able to state at what point in time you came to the conclusion that in fact the corporation, East Coast Cinerama or East Coast Cinematics, occupied the basement portion of those premises?

A Occupied? Yes, sir.

Q And when would that have occurred?

A At the time prior to the search warrant.

Q At the time you were down in the basement?

A Yes, sir.

Q What caused you to reach that conclusion?

A There was a certificate on the wall.

Q A certificate of occupancy?

A Yes, sir, I believe that's what it was

Q For East Coast Cinerama?

A Yes, sir.

Q Now you stated that when you first went up to 113 West 42nd Street, you saw affixed to the door a hand-written piece of paper listing a series of other corporations as well as East Coast?

A Yes, sir.

Q I show you what has been identified as Government's Exhibit 12 and ask you if you can recognize it?

A Yes, sir.

Q Is that in fact a copy of the document you saw at that time?

A Yes, it is.

Q You have also stated, I believe on cross-examination, that police photographers tooks pictures of the premises at 210 West 42nd Street; is that correct?

A Yes, sir.

Q I show you Government Exhibit number 10 for identification and ask you if you can recognize that.

A Yes, sir, that's the machine used to shellac the film and dry it.

Q Is that a photograph of that rear portion of the store?

A Yes, sir, it is.

Q At the time that you searched that store on January 27, 1973?

A Yes, sir.

Q Can you by looking at that picture based on your memory, please state to the Court from where that picture was taken?

A It was taken from the doorway in which I entered the premises, sir.

Q That is, the back portion of the premises?

A Yes, sir.

Q Is a picture of the door which was attached to that doorway on that -- revealed in that photograph?

A No, sir.

Q That door that you opened up or that was partially opened which you opened further, sir, to get into that portion, as you entered, did you open that door by pushing it in or pulling it out?

A I have a recollection the door opened out, sir.

THE COURT: Toward you?

Q The door opened out, you mean you pulled it toward you?

A That's my recollection. This is a long time ago, sir. I don't remember whether I opened in or out, I tell you the truth.

Q But that photograph is taken from the doorway; is that correct?

A Yes, sir it does.

Q In that photograph are there pictures of any doors at all?

A Yes, sir, there is a number of doors laying on the side.

Q The doors you had previously mentioned as being there?

A Yes, sir.

Q Are there pictures of films or film boxes there?

A Yes, sir, there are.

Q I show you Government's Exhibit 11 for identification and ask you if you can recognize that?

A Yes, sir.

THE COURT: What number?

MR. LEVITT: Eleven, your Honor.

Q Would you please state, sir, what is that a picture of?

A That's a picture of the machine and a table, sir.

Q Is that upstairs or downstairs?

A That's upstairs.

Q That's from another point of view?

A Yes, sir, that's the area leading towards the

stairway. If you were standing on the stairway going down into the basement this picture would denote that.

Q You have mentioned that downstairs there was another room; sometimes you'd call it a room and sometimes you called it an office which Mr. Sainthill opened the door to.

A Yes, sir.

Q Was that, in fact, as you can recall it now, an office or a room?

THE COURT: Well, an office and a room can be the same things.

MR. LEVITT: Well, your Honor, if I may qualify it.

BY MR. LEVITT:

Q By an office, I mean a desk with a chair, perhaps a phone, perhaps some books?

A There was a desk there. There was a phone. There was a lot of other equipment.

Q Equipment?

A Yes.

Q What was it?

A There was a -- the units used to project the film, project them.

Q Was it in the form of a storeroom?

A They were stored there. I guess it was repair.

No, I wouldn't say storeroom. I guess it was a repair area where they repaired the machines from.

MR. LEVITT: I move Goverment's Exhibits 10, 11 and 12 into evidence.

MR. KASSNER: I have no objection.

(Government's Exhibits 10, 11 and 12 received in evidence.)

MR. KASSNER: Let me see 12.

THE COURT: What is 12 supposed to depict? Is that the basement?

MR. LEVITT: No, Exhibit 12 is the hand-written note, your Honor.

MR. KASSNER: That he couldn't testify where he got it from or when he got it from; is that the one?

MR. LEVITT: No, that's the one which was on the door which he now testified that he recognized as being the one on the door.

MR. KASSNER: Didn't he testify before that he couldn't tell it was on the door or somewhere else?

MR. LEVITT: The document which the witness was speaking of was what had previously been marked as Government's Exhibit 7 for identification.

THE COURT: That's 210 isn't it? Is that 113?

MR. LEVITT: That's 113, yes, your Honor.

MR. KASSNER: I have no objection.

THE COURT: All right, go ahead.

BY MR. LEVITT:

Q I show you what has been marked as Government's Exhibit 13 for identification, Detective Gray. I ask you to examine it and state whether you can recognize it.

A Yes, sir, that's part of the underground area, cavern, basement, that would lead from the back portion of 210 to the other work office.

Q And to the best of your recollection, does that picture portray the condition and the material in that basement at the time of your search on January 27, 1972?

A Yes, sir, except that there were a considerable number more of these machines.

MR. LEVITT: I offer Government Exhibit 13 in evidence.

MR. KASSNER: Your Honor, I'd like to know what this has to do with the case. I'm not willing to concede that a coin-operated film machine in a premises has any sort of probable cause or presumption or even an inference of the showing of obscene films in those machines; particularly when they are in a place without film in them, and they are sitting in a warehouse-type arrangement or in a repair arrangement. I don't understand what the relevance of this thing is

at all.

THE COURT: You went to great point to cross-examine this witness to describe what was downstairs. This more or less pictorially indicates what he was describing to you in words. Objection is overruled.

(Government Exhibit 13 for identification received in evidence.)

MR. LEVITT: The Government has no further questions, your Honor.

THE COURT: Strictly on recross.

MR. KASSNER: Yes, your Honor.

RECROSS-EXAMINATION

BY MR. KASSNER:

Q You stated that when you categorically on cross-examination stated that you brought three films from the store to Judge Weiss and viewed these films with Judge Weiss, you state that now that's not true; is that correct?

A I'm stating that I showed Judge Weiss three films. I said I did it by machine, whether I picked it up at the office or whether I picked it up or I brought it with me, I didn't recall. I was not totally clear on how those films got there. That was 1972, I have had a number of cases since then.

Q Mr. Gray, all I asked you was did you state before

that you brought the three films from the store to Judge Weiss?

A I believe I did say that, sir.

Q You did?

A Yes, sir.

Q And now how do you know that that's not true?

A The affidavit indicates that in fact I got those films in question shown to the judge from 250 and 136 West 42nd Street.

Q Does that affidavit give you any independent recollection or are you taking the word of that affidavit?

A That -- I'm taking the word of the affidavit and also indicated that when I was first asked that question, I was not quite sure in my own mind how those films got to the judge.

Q I didn't ask you your state of mind. You are taking the word of the affidavit; is that correct?

A No, and also my own -- my own mind, sir.

THE COURT: I think the man says past recollection recorded.

MR. KASSNER: If it's true, I guess it could.

Q Now, you are saying that you never brought "Sex Nurse" before Judge Weiss; is that correct?

A No, sir, I brought these films before him.

Q Now you are saying it's three films. Your affidavit says two films. Before you said three films, you said you were lying before.

THE COURT: He didn't say anything about lying.

A There was evidently two rolls of film, excuse me, there were two films taken to him. One, I believe, had already been previously deemed. I don't know whether that was taken to him or not.

Q Did you take "Sex Nurse" to Judge Weiss?

A I took a copy, I believe, "Sex Nurse" to him. I did not take the one off the --

Q Where did you get the copy from?

A I'm not sure, sir.

Q Is it in your affidavit?

A No, sir.

Q Now you say you brought Judge Weiss "Superman" and "Piss or Susan"?

A Yes, sir.

Q But you don't say you brought him "Sex Nurse"; is that correct?

A That's correct, sir.

THE COURT: That's what he said on cross.

MR. KASSNER: That's not what he said on cross. He said he brought him all three films and he brought them all

from the store.

THE COURT: I'm sorry my notes indicate "Sex Nurse" was not brought to Judge Weiss.

MR. KASSNER: If your Honor please, he testified --

THE COURT: Now look on --

MR. KASSNER: The record will show what he said on cross. What else can I say?

THE COURT: So don't argue with me.

MR. KASSNER: I'm not arguing with you, Judge. It does not get me anywhere.

BY MR. KASSNER:

Q You brought a print of a film called "Superman" and a print of a film called "Piss on Susan" from two other places?

A Yes, sir.

Q Did you compare with the prints, the prints which you showed Judge Weiss with the prints that were in the store?

A Just the -- I would imagine the leader, sir. I don't recall whether they were compared or not frame for frame.

Q Then you got Judge Weiss to issue a warrant on the basis of films that were not in the store.

THE COURT: No, he said he relied on the title.

MR. KASSNER: If your Honor please, he can rely

on the title all he wants, but every single print that's shown once or twice is different from every other print. They break, they are put together, they are edited. Every print is different from every other print. The only time two prints are alike is when they come out of a lab. That's the only time. Every print is different, once it is --

THE COURT: You mean every print breaks the first time you show it?

MR. KASSNER: Every print that goes into a peep -- coin-operated film machine or in a motion picture theater with the finest equipment comes out --

THE COURT: Breaks the first time you show it?

MR. KASSNER: Your Honor, I didn't have any testimony that it broke the first time. I'm telling you that after a week in a coin-operated film machine or in Radio City Music Hall, the print is different from what came to it and different from every other print.

THE COURT: Go ahead.

MR. KASSNER: Particularly in a coin-operated film machine, but it's also true of Radio City Music Hall and judges have excluded prints with the same name on motion picture film.

THE COURT: Let's get back to the testimony of this witness. It's now after three o'clock.

BY MR. KASSNER:

Q Now you say you found a business certificate when you went to the basement with Sainthill; is that correct?

A I saw one there, yes, sir.

Q And you say that it was East Coast Cinematics' business, place of business; correct?

A Yes, sir.

Q At that point you believed it was East Coast Cinematics' place of business; is that correct?

A Yes, sir.

Q Why didn't you leave the premises at that time?

A I did.

Q You did. You never came back?

A Went back upstairs. I came back later with a search warrant.

Q In other words, you saw nothing until you came back with the search warrant?

A I didn't say that, sir.

THE COURT: He didn't say that at all and it's not inferred in his answer.

Q Did you conduct a search?

THE COURT: You do this constantly, picking up a witness' statement and turning it around as though he said something. He didn't.

MR. KASSNER: Judge, I was --

THE COURT: This witness says, "I don't know," and your next question assumes the answer is yes to the question.

MR. KASSNER: I believe the record --

THE COURT: Please go on.

BY MR. KAFFNER:

Q Did you testify before that when you came into the premises for the first time you met Sainthill, you talked to Sainthill, you went downstairs, you came upstairs, you took Sainthill back into the bookstore; is that correct, and then you went in and conducted a search?

A I never said that. You said a search?

Q When did you first conduct a looking?

A No, sir, I looked at the films upstairs. I never went back downstairs.

Q I'm not talking about going back downstairs.

A That's where you asked about the certificate.

THE COURT: The whole thing stems from your question, why didn't he walk out, and his answer was, "I did walk out."

Q When did you conduct your first inspection or looking inside the premises of East Coast Cinematics, Inc.?

THE COURT: To his knowledge.

MR. KASSNER: I'm not asking about anybody but his

knowledge.

THE COURT: I'm sorry. It's not clear because this witness breaks it down into two phases. Now you determine which phase you want him to answer.

BY MR. KASSNER:

Q When did you, yourself, first look at the material in the East Coast Cinematics' portion of 210 West 42nd Street?

A Upstairs or downstairs, sir?

Q Upstairs.

A After leaving the premises downstairs, walking with Mr. Sainthill back upstairs, I took him into the outer portion of the area, and I returned. And I stayed upstairs because when Mr. Sainthill left downstairs he locked the downstairs door. I asked him to --

Q Did you believe the East Coast Cinematics' portion at that point was limited to downstairs?

A I was not clear other than that that was on the door. I was not clear. I wasn't getting any -- you know it just wasn't clear who owned what.

Q You mean you, at that point, believed that East Coast Cinematics was downstairs, but you weren't sure they were upstairs?

A Well, Mr. Sainthill had the keys for East Coast Cinematics downstairs was also working on a machine upstairs.

Q Didn't he have the keys upstairs?

A I don't know.

Q But he was also working upstairs so you assumed that East Coast Cinematics had the upstairs and the downstairs of the rear portion; is that correct?

A I was trying to ascertain that, sir.

Q There came a time you were asked by the assistant U. S. Attorney, when you concluded that East Coast Cinematics did operate that premises.

A No, it operated -- that certificate was only in that room downstairs, sir.

Q And the fact that Mr. Sainthill worked upstairs and had the key to downstairs and he told you that East Coast Cinematics had both places --

A Well, due to the fact that he was working just inside a door with another 30 operable peep show machines working on the outside, I don't know whether I could ascertain that he was a mechanic or what he was doing, sir.

Q Now, it's your testimony that -- the bookstore was open to the public, was it not?

A Yes, sir.

Q The peep show area in back of the bookstore was open to the public, was it not?

A Yes, sir. General public, people who --

Q Yes.

A But people were asked to leave.

Q I'm not talking about on that day.

THE COURT: That isn't the question. Any person off the street could walk in and you'd see the bookstore and if you wanted to, in walking around the premises, could come into the area where the peep show was going on?

THE WITNESS: Yes, sir.

BY MR. KASSNER:

Q And then, it is your testimony that if you wanted to you could walk through a partially opened door and go into a film coating laboratory; is that correct?

A Yes, sir.

MR. KASSNER: I have no further questions.

THE COURT: You may step down.

Next witness.

MR. LEVITT: Government calls John Jacobs to the stand, your Honor.

J O H N J A C O B S, called as a witness for the Government, having first been duly sworn, testified as follows:

xxx DIRECT EXAMINATION

BY MR. LEVITT:

Q Mr. Jacobs, how are you employed?

A I am an assistant district attorney in New York County.

Q How long have you been so employed?

A About five years.

Q Were you so employed in January of 1972?

A That's correct.

Q In January of 1972, did you have cause to deal with Detective Donald Gray?

A Yes.

Q In that dealing with that gentleman, did you aid in the drawing up of various warrants and affidavits?

A Yes.

Q Was one such affidavit an affidavit for Mr. Gray for the search of a bookstore at 210 West 42nd Street for the purpose of obtaining a volume of a certain book by the name of "Libido" or magazine and various books and records of that operation?

A Yes.

Q And to your knowledge, did Detective Gray submit the affidavits which you had drawn to a judge of the New York Criminal Court?

A Yes.

Q To your knowledge, was a warrant issued based upon that affidavit?

A Yes.

Q I show you what has been marked as Government's Exhibit 2 in evidence, and ask you if you recognize that document.

A Yes.

Q Is that in fact the warrant which was issued based upon the affidavit of Detective Gray which you have just mentioned?

A That's correct.

Q What is the date of that warrant?

A January 27, 1973.

Q On the date of that warrant, sir, did you during the course of the day proceed to the bookstore located at 210 West 42nd Street?

A That's correct.

Q At the time you arrived, was Detective Gray already at the bookstore?

A Yes.

Q And did he tell you of what he had seen in the rear portion of the bookstore?

MR. KASSNER: Objection, your Honor. Would you stop leading the witness and allow him to testify in the normal manner?

THE COURT: He merely asked him: Did he tell you.

He's not asking him what he did.

MR. KASSNER: Yes, but he's telling him.

THE COURT: Overruled.

A I'm sorry; could you repeat that?

Q The question was: Did Detective Gray tell you what he had found at the rear portion of the bookstore?

A That's correct, he did.

Q In this bookstore, sir, is there a doorway in the rear wall of the bookstore leading --

THE COURT: No, ask him to describe it.

Q Would you please describe the bookstore premises.

A As I recall, 210 West 42nd Street on January 27, 1972 when I arrived, there was a front portion of the bookstore which had series of magazines and a center area where magazines were displayed.

In the rear of the bookstore there was an entranceway that led into -- oh, I'd say maybe 20 or 30 peep show machines.

In the rear of the peep show machines there was a door that led into the back of what I would call a factory or repair shop for the peep show machines. This is all on the first floor.

Then there was a stairway, I believe a metal stairway, circular, leading down into the basement of 210

West 42nd Street where there was what I would describe as a major repair shop or factory for the peep show and films.

Q This door which you have discussed leading from the front portion of the bookstore to the rear portion of the bookstore on the main floor, when you looked at the door was it open or closed?

A It was open.

Q Was it broken down or was it on its hinges? What was the condition of the door?

A I don't recall it being broken.

Q Was there anything on the door?

THE COURT: Was it hanging from the door jamb?

THE WITNESS: No, it was not.

THE COURT: Therefore there was no door, there was no door that could be opened or closed to that?

THE WITNESS: I recall there being a door, your Honor, but I don't recall the door being broken down or on its hinges. I recall there being a door though.

THE COURT: An operable door?

THE WITNESS: That's correct, sir.

BY MR. LEVITT:

Q To the best of your recollection, was there anything written on either side of that door?

A I recall there being some sort of a sign that said,

"No Admittance."

Q To the best of your recollection was there anything on that door which indicated who owned the premises, that portion of the presmises which lay beyond the door?

A No.

Q Thereafter, after you had visited the bookstore that day, was a second warrant issued for a search of the rear portion of the premises at 210 West 42nd Street?

A I believe it was the rear and the basement, 210 West 42nd Street, that's correct, warrant number 2 was issued.

Q Now, with regard to that warrant, sir, do you know who, if anybody, instructed the police to obtain another warrant?

A I believe it was at my direction, and as Assistant District Attorney Hugh Levine, who had accompanied me to the bookstore that afternoon, January 27, 1972.

Q Did you direct the police to obtain another warrant because you, as an attorney and assistant district attorney, believed that another warrant was called for under the law?

A That's correct.

Q And that warrant was obtained?

A That's correct.

Q On January 27, 1973, to your knowledge, was a warrant issued for a search of the premises located at 113 West 42nd Street on the 17th floor?

A Yes, the same time I believe warrant number 2 was signed, warrant number 3 was drawn up by me and submitted to Judge Weiss, I believe, that evening, January 27, 1972.

Q At the time of the submission, was Judge Weiss also shown copies of two films?

A That's correct, in my presence.

Q Were those films entitled "Superman" and "Piss on Susan"?

A Yes, the films were shown, as I recall them, in their entirety to Judge Weiss, in my presence by me.

Q And thereafter, sir, to your knowledge, did the police then go to search the offices located at 113 West 42nd Street in the name of East Coast Cinematics?

A They went with me. I was directed to go by the head of the Criminal Courts Bureau, to accompany the police officers in the execution of the search warrant at 113 West 42nd Street.

Q When you arrived at those premises, particularly those premises occupied by East Coast, did you find a hand-written note attached to the door of those premises?

A That's correct, I did.

Q At that time was the name East Coast on that hand-written note, among others?

A I believe it was, yes, I believe it was either the first name or the second name.

Q I show you Government Exhibit 13 in evidence, and ask you if that's a copy of that note.

A Yes, that's correct. This is a copy of the note that was on the outside of the door of the offices of the corporations.

Q And at that time was the door to that office open or closed?

Q Was closed and locked.

Q Did you attempt to gain entrance?

A Yes, upon my direction the police officers knocked on the door, and announced their -- who they were. There was no response and at my direction I believe the police officers went back downstairs again, got to some crowbars and broke open the door at my direction.

Q And at the time that you first arrived at that door, were there any signs that that door had previously been broken open?

A No. It was locked.

Q And at the time that you arrived at that premises with the police officers, had they or any of them that were

there drawn their guns?

A This is at 113 West 42nd Street?

Q Yes.

A No, I don't believe that there was any need to. There was no response. This was about 11:30, 12:00 o'clock at night.

MR. COURT: The question was: Did you see any police officer draw his gun?

A No.

Q When you had first earlier that day gone to 210 West 42nd Street, did you observe any police officer waving his gun about when you were there?

A No, sir.

Q Thereafter, the following day, that's on January 28, 1972, did you cause the police to obtain another warrant for the search of the premises located at 113 West 42nd Street?

A I did.

Q Would you please state why you directed them to do so?

A Well, it was based upon my understanding that warrant number 3, I will call it the first warrant that allowed us to gain entrance to 113 West 42nd Street, specified only East Coast Cinematics. Upon gaining entrance, myself and the rest of the police officers spent the remaining portion of the

night, I think it was about twelve or fourteen hours, examining the material in the presmises; and it was my conclusion that the corporations were so commingled that it was necessary to draw up a fourth warrant so that we could seize the additional books and records from the remaining corporations.

Q What was the physical state of the office and its contents when you first entered that office?

A Based upon conversation with two of the employees of East Coast Cinematics and from what I observed, the premises had just recently been occupied, and from what I could see, the companies looked like they were just moving in. I believe there were two or three offices inside this complex, and things were just starting to look like they were just starting to be put away. There was still some construction work being done in an office to my left as you walked into the complex of offices.

MR. LEVITT: I have no further questions, your Honor.

THE COURT: Mr. Kassner.

x CROSS-EXAMINATION

BY MR. KASSNER:

Q Mr. Jacobs, do you recall the procedure used by the Police Department in connection with deemings and seizures going on in 1972, 1971 and 1973?

MR. LEVITT: Objection, your Honor.

THE COURT: Sustained.

Q The film "Piss on Susan" was seized when?

A For the first time?

Q Yes.

THE COURT: At these premises.

A At these premises?

Q Yes.

A At these premises? It was seized after and during the execution of the second warrant.

I'm talking about Judge Weiss' first warrant. In other words, the first warrant was for "Libido", a book. Nothing was seized pursuant to that warrant and it was after the execution of the second warrant that I directed the police officers to take whatever copies there were of "Piss on Susan" that were on the premises.

Q All copies?

A I believe there were only one or two copies.

Q But you directed them to take all copies of "Superman" on the premises?

A Up to six, I believe that's correct.

Q They took eight.

A I'm aware of directing them to take up to six on each premises that was at the -- at 210 West 42nd Street.

I'm not certain of the exact number they took.

Q Can you think of any reason why "Piss on Susan" doesn't appear on your inventory?

A I haven't seen the inventory.

(Document handed to the witness.)

A I'm sorry, the question Mr. Kassner was what is the reason why it does not appear on the inventory?

I have no reason why it should not appear on the inventory.

Q Did you supervise that seizure?

A Yes.

Q Do you know the warrant you obtained, you call it the second warrant?

A Well, there were four warrants in all. I kept track of them by --

Q The second warrant was the Weiss warrant for the seizure of three films?

A That's correct.

Q This is the return on that warrant.

THE COURT: What is the exhibit number for the record of the Weiss warrant for the seizure of three films?

By three films, I assume you mean three titles, not three copies of the same title?

MR. KASSNER: Yes, three titles.

THE COURT: What is the exhibit number for that?

THE WITNESS: I believe it says B, your Honor.

THE COURT: The warrant?

MR. KASSNER: I think it's my B.

THE COURT: Yes, all right.

MR. KASSNER: Of my A. This is my B. The return is my B.

THE COURT: What are you talking about, the warrant or the return?

MR. KASSNER: The warrant I think is my A because I don't think you put it in evidence.

THE COURT: No, he did not.

MR. KASSNER: And the return is my B.

THE COURT: All right.

BY MR. KASSNER:

Q Now, I ask you if you supervised the seizure -- and the warrant called for the seizure of three titles, can you explain why two certificates from the State of New York were seized?

A Two certificates?

Q Right.

THE COURT: Is that certificates of doing business?

MR. KASSNER It just says certificates. I assume it's the certificates they testified were hanging.

THE COURT: Yes.

A Yes, I believe they evidenced who the corporations were that maintained the premises in question.

A Did you have a warrant to seize that?

A A warrant to seize that? No. You mean whether those things were named in a warrant? The answer is no.

Q How about the one card with the store routes on it? Did you have a warrant to seize that?

A I think what was named in the warrant is in the warrant. I think it was three films were named in the warrant to seize.

Q That's correct, three films.

You supervised the seizure; you're Assistant District Attorney of New York County. You have been put on this stand to testify because of your respectability.

Would you take a look --

THE COURT: He was not put on for his respectability. He was put on to tell what the facts were.

Q Tell me what on that warrant --

THE COURT: Strike that as to respectability. There is no jury here and behave yourself.

MR. KASSNER: I'm sorry, your Honor.

BY MR. KASSNER:

A Tell me what was taken under that warrant, what

items do you claim were authorized by Judge Weiss's warrant?

THE COURT: It speaks for itself.

Next question.

MR. KASSNER: That's the answer?

THE COURT: Yes, next question.

BY MR. KASSNER:

Q Now on cross-examination, Mr. Gray testified that he took a print of each of these three titles from the store to Judge Weiss, had him view them, then took them back to the store with the warrant A that Judge Weiss issued, seized those prints along with the others. He then on redirect examination said that he didn't take them from the store, that, in fact, he was not sure that he took "Sex Nurse" before Judge Weiss at all, and that he took the other two prints, "Superman" and "Piss on Susan" from two other locations.

Do you have any way to determine which of his stories was correct?

MR. LEVITT: Objection, your Honor.

THE COURT: Sustained.

Q Did you see where the films brought before Judge Weiss came from?

THE COURT: Let's start over.

What films were brought before Judge --

MR. KASSNER: "Superman" and "Piss on"--

THE COURT: Not you, the witness. We are trying to find out from the witness what he knows, not what you think it is.

MR. KASSNER: I'm asking him if he saw where the films --

THE COURT: I asked him what films were brought before Judge Weiss.

THE WITNESS: I believe there were two films, your Honor. I believe it was "Piss on Susan" and "Superman". I'm not certain which of the two of the three were brought before Judge Weiss. They were obtained, as I recall it, from my office, on another case that we had either pending at that time or had been finished. I had directed the Police Department not to take any movies out of 210 West 42nd Street front, rear or the basement, until the judge had seen them, and it was at my direction that Detective Gray was told not to take any movies out of the premises, and the two movies that were shown to Judge Weiss were taken from my office; not from 210 West 42nd Street.

BY MR. KASSNER:

Q And he was shown films that were not on the premises; is that correct?

A That's correct.

Q And is there any way that you can swear that those

films were identical to the ones on the premises?

A I observed and examined the films that were on the premises at 210 West 42nd Street, both the outer box, the photo that appeared, and looked through the films themselves; and based upon my experience, I believe that they were identical in nature to the films that I had in my office.

Q How did you examine the ones at 210 West 42nd Street?

A I took them out of the box, I held them up, and I believe also on the reel machine themselves, "Sex Nurse" was on the machine itself and you could see pretty clearly the acts depicted, and I'd seen these movies, I would say, probably ten or fifteen times before.

Q You did this before you got the warrant?

A Before warrant number 2; that's correct.

Q Before you went and got warrant number 2?

A That's correct.

Q Now let's talk about warrant number 1.

What did it authorize you to seize?

A I believe the warrant states certain books and records and a magazine entitled "Libido". I'm not certain of the volume or the number.

Q When you were looking at these films up against the light, were you believing that these were books and

records or a magazine called "Libido"?

A It was my belief, after speaking with the police officers, that they had evidence that a present crime was in the process of being committed, and that one of the corporations or individuals was in possession of obscene films; and based upon the fact that various courts have held that the material can't be seized, we took the precaution of showing them to a judge. Had that been heroin --

Q Mr. Jacobs, I'm talking about what you did before you showed them to a judge, not what you did after you showed them to a judge.

A Mr. Kassner, you interrupted me.

Q You are talking about --

THE COURT: He asked you a question which does not call for this long dissertation. I gather you looked at these films by holding them up to a light?

THE WITNESS: That's correct, sir.

THE COURT: You saw the names on boxes?

THE WITNESS: That's correct.

THE COURT: You saw pictures on boxes?

THE WITNESS: That's correct.

THE COURT: That's his answer.

BY MR. KASSNER:

Q You did this before you got a warrant; is that

correct?

A That's correct.

Q And this was not done pursuant to the warrant of Judge Solniker for the initial search, warrant number 1, was it?

A That's correct.

Q Did you take these films out of boxes?

A No, I believe the films were already out of the boxes on the table in the rear of 210 West 42nd Street. At least when I got there they were out of the boxes in the rear of 210 West 42nd Street. I don't know what the police had done before I came, but one film, "Sex Nurse", was actually on the machine being worked on.

Q Is it possible for you tell on eight millimeter film, holding it up to the light, whether the film is simulated or explicit?

A I believe I can tell.

Q Is it possible for you to tell by holding a film up to the light whether the film has social redeeming value or has no social redeeming value?

MR. LEVITT: Objection.

THE COURT: Overruled.

A Well, based upon my experience, I have seen no eight millimeter movie of that duration that contained

explicit acts that had socially redeeming value or that's ever been held to havesocially redeeming value by any court.

Q We're talking about this film, not any other film.

THE COURT: Wait a second. Aren't we going afield here? We're dealing with probable cause to go in, aren't we? The question is: Is it sufficient, from seeing a title printed on a box, from seeing a lead, seeing a picture pasted on the box, to draw the conclusion that that film is the same as the title which he has already seen?

That's the issue. You keep telling me that you can run it for a week and it's not the same print; but you are not telling me they are substituting whole new passages on that film, or changing the main content of the film, are you?

MR. KASSNER: What I'm saying, your Honor, is they didn't even have a film in their office that had been found to be obscene after an adversary hearing. They had a film that had been deemed by a judge.

THE COURT: That's not sufficient to make a seizure?

MR. KASSNER: That's not sufficient to make -- I gave you a brief today, your Honor, you haven't read it, on first amendment implications of a seizure based on a deeming.

Now, Judge, this whole procedure went on for two

years in the Stateof New York. It was cut out after a decision which was not appealed from, and the procedure was completely dropped. They no longer have deeming lists, they no longer go in --

THE COURT: I don't know about deeming lists. All I know is, as I sit here now, the seizure or the taking was made on the basis that they are familiar with the movie "Superman", which had been deemed to be, and therefore they seized those boxes which had film in in which the boxes contained the title "Superman".

MR. KASSNER: They have no right to do that, your Honor. That's exactly the point.

THE COURT: Wait a second. Don't argue the law with me. That's the issue, isn't that, in this case?

MR KASSNER: No, that's not the issue. Let me tell you what I think the first issue is. The first issue is: Can you walk into a premises and start looking around the premises for something other than you were asked to look a -- you were asked to seize with a warrant?

THE COURT: Wait a second. It's in plain view.

Go ahead.

MR. KASSNER: Your Honor, the film was not in plain view.

THE COURT: Continue. It's twenty-five to four now.

MR. KASSNER: All right.

BY MR. KASSNER:

Q But Judge Weiss did not see "Sex Nurse", is that correct?

A I'm not certain which of the two of the three he saw. One of the three he didn't see.

I think after "Piss on Susan" he didn't want to see the third one.

Q The only film named in the affidavit in support of Judge Weiss' warrant happens to be "Sex Nurse". It isn't "Superman", it isn't "Piss on Susan." I'm talking about the warrant to search 113 West 42nd Street. And according to Mr. Gray's amended testimony on redirect, the films that he took from your office were "Piss on Susan" and "Superman", and not "Sex Nurse".

Now, do you want to correct his testimony?

THE COURT: No, don't do that, please. You ask him what he knows. Don't ask him to correct somebody else's testimony.

Q How long were the police in 113 West 42nd Street?

A I would say at least 18 hours.

Q Was Mr. Hodas then free to come back into his office?

A As I recall, at my direction police officers called

Mr. Hodas or called some member of the company and informed them of what had been taking place, asking them whether he wished to have the premises secured or by what method. I believe, as I recall it, Mr. Hodas or one of the members of the company didn't want to come down and we felt he didn't want to leave the premises open, so we had a police officer stand guard at the premises. I believe we spoke to -- I think it might have been Mr. Hodas' father, if I recall. I'm not certain, but it was someone that said they didn't want to come down to the premises.

A Do you know an attorney named James Bernard?

A Yes.

Q Did he call you the second day after the entry, the third day after the entry, and the fourth day after the entry, trying to obtain permission for his client to come back into his own office?

A No.

Q Did you speak to James Bernard in any of the five days following your entry into 113 West 42nd Street?

MR. LEVITT: Objection, your Honor.

THE COURT: Sustained.

Q Now, you state there were hundreds of films on the premises?

A I haven't stated anything concerning the films.

Q Were there hundreds of films on the premises?

MR. LEVITT: Which premises are we referring to now?

Q 210 West 42nd Street.

A I don't think there were hundreds. There were quite a few. I would say maybe around a hundred.

Q You directed that only three films be seized?

A Three titles as pursuant to Judge Weiss' warrant. I believe that there were several copies of each of the three films seized, but only three titles, the three titles named in the warrant.

Q If you take a look at the return, you will find that there were eight copies of "Superman" seized. Look at items 2 and 4.

(Document handed to the witness.)

A Yes, I see it.

Q Did you prepare that inventory?

A No.

MR. KASSNER: I have no further questions.

THE COURT: Any redirect?

MR. LEVITT: No redirect, your Honor.

THE COURT: Thank you. You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. LEVITT: Government has no further witnesses,

your Honor.

THE COURT: Government rests.

Mr. Kassner? Government rested, Mr. Kassner.

MR. KASSNER: I'm sorry.

A L F R E D L. S C O T T I, called as a witness by the defense, having been duly sworn, testified as follows:

xxx DIRECT EXAMINATION

BY MR. KASSNER:

Q On January 27, 1972, were you at 210 West 42nd Street?

A Yes, sir.

Q What were you going there?

A I was clerk.

Q In where?

A In the bookstore.

Q Would you describe the bookstore?

A At that time it was a front, storeroom, peep show and East Coast.

Q When you say, "and East Coast," was that part of the bookstore?

A No, sir.

Q Did you work for East Coast?

A No, sir.

Q What separated the peep shows at the back of the bookstore from East Coast's area?

A A door.

Q A door. Was that door locked or unlocked?

A It's always locked.

Q Was it closed at all times?

A Yes, sir.

Q You were in that store every single day, weren't you?

A Every day, you know, at the time I was in the store.

Q Was there ever any occasion that you found the door between East Coast and the bookstore open?

A Like only when they take out machines and that's about it because they then lock it right behind.

Q The area that the public could walk around in your store, did that go right up to the door?

A Yes, sir.

Q In other words, if that door was open members of the public could just walk right in?

A Yes, sir.

Q Now on the 27th of January ,1972, did anything unusual happen?

A Yes, sir.

Q Will you tell the Court what it was?

A I got arrested.

Q Aside from getting arrested, would you describe the circumstances preceding your arrest?

A Well, it's, you know, it's about three years, but I remember being in the back of the store, in the front of the store, excuse me, and a big bang back there, which I didn't know at the time what it was, but I found out later it was the door being knocked down.

Q Didn't you see -- they had to --

THE COURT: Wait; wait. You're the one who's complaining about leading.

MR. KASSNER: All right, I didn't finish leading yet, your Honor.

THE COURT: I know. I wanted to stop you before you got there.

Q Before you heard the bang on the door, did you know -- did anybody pass you?

A They went back there.

THE COURT: He wants to know who went back there.

THE WITNESS: That fellow with the beard, Sergeant, Lieutenant, Detective Gray.

Q Did he speak to you before going back there?

A No, sir.

Q You mean he just headed straight for the back of the store?

A As far as I can recollect, yes, sir.

Q He didn't arrest you first?

A Oh, yes.

Q He arrested you?

A Yes.

THE COURT: Let's start from the beginning.

He came in the door. What did he do?

THE WITNESS: "You're under arrest," that was it.

Q And then you heard a bang in the back?

A Yes.

Q Did you hear more than one bang or just one bang?

A It was a lot of things, you know. Jesus, it's a long time now, you know, it's like over three years. It was a bang. Like something was being smashed in.

Q Did you get back to the store that day?

A Tried to, but they had it closed.

Q They had it closed. Did you get back to the store the next day?

A Tried to. They had it closed again.

Q That door between East Coast Cinematics and the bookstore, was there anything written on the door?

A Yes, sir. As far as I can recollect, the same

thing that's on there now. It's been there since I have been in that store. East Coast Cinematics, do not enter, or no admittance, either way. It's been there since I have been in the store which is quite a while.

Q That was before January 27, 1972?

A Yes, sir, way before.

Q Was it legible?

A Oh, yes.

MR. KASSNER: I have no further questions.

CROSS-EXAMINATION

BY MR. LEVITT:

Q Mr. Scotti, going back to January of '72, what was yourfull-time employment, if you had any?

A Pardon?

Q Did you have any full-time employment?

A Right there, sir.

Q What?

A In Blackjack Books.

Q Clerk?

A Yes, sir.

Q I thought you stated --

A Sometimes, often, president. Clerk or president. When I'm at the register, I'm a clerk.

Q Clerk or president?

A Yes, when I'm on the register, I'm a clerk. I work at all -- everything in there: mop floors, you name it.

Q I believe you stated on direct examination, Mr. Scotti, that when the question was put to you: were you there every day, in that same store, you said, well, not every day, but I was there that day.

A Yes, sir.

Q Well then, what was your full-time employment if you weren't there every day?

A Sir, I'm sure not everybody works seven days a week.

THE COURT: The store isn't open seven days a week?

THE WITNESS: Yes, sir, that store is open seven days a week, your Honor.

THE COURT: How many days a week were you there?

THE WITNESS: At least six, five, six, sometimes seven.

THE COURT: That was your full-time employment?

THE WITNESS: Yes, sir.

THE COURT: You didn't work anyplace else?

THE WITNESS: No, sir.

THE COURT: All right, go ahead.

BY MR. LEVITT:

Q In describing the store, you stated going from front to rear that first there was a front?

A Yes, sir.

Q Then there was a storeroom and then peep show; and then East Coast; is that correct?

A Yes, sir.

Q What do you mean by the storeroom?

A On the side there was a storeroom.

Q There was a storeroom on the side?

A Yes, sir.

Q Separate room?

A With a door, yes, sir.

Q With a door. Is that one locked?

A At that time, sometimes it was, sometimes it was not.

Q This storeroom, that's where you kept your books, is that correct, that you were selling?

A Whatever we had extra we used to keep there, yes, sir.

Q Your books and records?

A No, sir, my records were up on the counter, behind the counter.

Q What was in that storeroom then?

A Whatever was there. There was mops. We used to

put the cardboard boxes there. Whatever was extra was in that storeroom.

Q Extra volumes of books which hadn't been put on display?

A Yes, sir.

Q Peep show films?

A No, sir.

Q Where did you put the peep show films that weren't in use?

A I had nothing to do with the peep shows at that time, sir.

Q Did you have peep show machines in your store itself?

A No, sir.

THE COURT: When you say "your store", do you own this store? Is this your business?

A I sublease it. I lease it.

THE COURT: This is your business, this bookstore?

THE WITNESS: Yes, sir.

THE COURT: It's your business?

THE WITNESS: Yes, sir.

THE COURT: So before when you said where you kept your books, and you said "I kept my books up in the front," this is your business, and you run it?

A Yes, sir.

THE COURT: Who ran the peep show business behind your bookstore?

THE WITNESS: That was East Coast Cinematics.

THE COURT: East Coast ran the peep show business?

A Yes, sir, at that time.

THE COURT: Go ahead.

BY MR. LEVITT:

Q I believe you stated that once again just to make sure, first there was the front, then the storeroom, then the peep show machines, then East Coast?

A Yes, sir.

Q As to those peep show machines, they were within the physical premises of your store, before the locked door, is that what you are stating?

A Yes, sir.

THE COURT: Anybody from the public could walk in and walk around in the peep show area?

THE WITNESS: Well, your Honor, I'm not sure, might have been another outfit yesterday could have walked in that peep show area.

THE COURT: Anybody, if I came in, I could have walked around into the peep show area?

THE WITNESS: Yes, sir.

Q Who owned those machines?

A We had no idea, sir. They were just there. They were part of the store and I'm right there.

Q This is your physical premise, that is, you are the owner of the bookstore, your physical premise?

A The bookstore.

Q There were peep show machines in there, you have no idea who owned them?

A Notthat I'd had have no idea. It's just I don't know if I was to say one person and then it would be another person, I'd be lying. I couldn't--

Q So, very simply, you don't know.

A -- specifically state who it was.

Q All right.

THE COURT: What portion of these premises did you sublet?

THE WITNESS: I didn't sublet. I leased the front portion, the books, the book end.

THE COURT: From whom did you lease it?

A Island Amusement.

Q To your knowledge the East Coast lease?

A To my knowledge, I take care of my business, they take care of their business. They don't bother me, I don't bother them.

Q But you leased your premises from Island Amusement?

A Island Amusement right.

Q Not East Coast?

A Island Amusement.

Q I believe you stated that in dealing with anybody who could go in and open that back door, they just go in, take machines out, and lock the door; is that correct?

A I say that's the only time I seen it, when they open a little bit.

I would go to the bathroom downstairs and that would be it too.

Q So --

A It wasn't open for the public.

Q Are you stating that the washroom facilities on that premises, 210 West 42nd Street, was in the basement?

A It was just a courtesy on their part that I used to use it.

Q What did you do? Was there a secret code to knock on that door and they'd open it?

A There was a telephone upstairs, and I know their number till today.

That don't mean that I have got anything to do with it.

Q So you call from your premises to the other side of the door, they would unlock the door?

A Yes, sir.

Q Open it up, you'd walk in, they closed the door, you'd come out?

A Yes.

Q How many clerks did you have at that time working with you?

A Me and one other.

Q What was that?

A That could be a number of -- lot of guys, my son, for instance. He was one of them.

Q I didn't hear you.

A My son, for instance, he was one of them.

Q Was there a person there full-time other than yourself?

A Yes.

Q Who?

A Me and the clerk, the night men, there was two at night and me and the day man.

Q When you were there?

A At that time, I believe it might have been Donald Styles.

Q While you were on duty there as a clerk, did you

have anybody else working there full-time?

A Yes.

Q And who was it, Donald Styles?

A Donald Styles.

Q And he'd always be there if you were not there?

A No, my son might be there too.

Q I believe you stated that Donald Styles was working there?

A I also stated my son. Also you want a couple others I can --

Q I want to talk about --

THE COURT: Who was there on January 27, when you were arrested?

THE WITNESS: You got me there. You got me who was there. Like I say, your Honor, it was three-and-a-half years ago, and I have got a lot of people in and out. I believe it might have been Donald Styles. It might have. Might have been my son.

THE COURT: All right, go on to your next question.

BY MR. LEVITT:

Q Were there periods of time when these people would go into the rear room and stay there?

A Not that I know of.

Q They wouldn't?

A If they did, they were fired. They are getting paid to watch the thieves on the outside.

Q No, no. I'm talking about the people that used the back room. You discussed how at timespeople would come in, take machines out, and lock the door. Right? Isn't that right?

A These were the people that worked there. I wouldn't know how long they stood there. That was not my problem. My problem was the book end. It was none of my business.

Q Did they pass through your premises to get into that rear room?

A They had to pass through my premises to get into that rear room.

Q Did they pass through your premises to leave that rear room?

A They could have gotten either way from the cellar into the street.

Q When did you first rent those premises?

A Oh, gee, it's been quite a while, about five, six years.

Q '68?

A Five or six years. I don't know.

Q What is five or six years?

A Figure it out. It would be '70, it could be '69.

That's five or six years.

Q Could be '68.

A Well, I didn't go to school too much. It's seven years. If you say I said five or six.

Q I'm asking you if you can tell me the year in which you took that lease.

A I couldn't tell you the year, because time just drifts by.

Q Excuse me?

A Time drifts by.

Q Time drifts by?

A That's right.

Q Could have been 1969, you think?

A It could have been.

Q Why don't you dwell on it for a moment?

A You want me to be specific? I will go call my accountant up and then I will be specific. If you like, nov

Q Just dwell on it for a moment and tell me.

THE COURT: Does it make any difference whether its five or six?

MR. LEVITT: Yes, your Honor, it does.

THE COURT: He's given you his best answer. Next question.

Q So it could have been 1969?

THE COURT: Five or six years.

Q And always during that time there was a sign on the door which said, "Do not enter. East Coast Cinematics" or "No admittance, East Coast Cinematics"; is that correct?

A As far as I could remember, yes.

Q Are you aware that the name East Coast Cinematics didn't come into existence until mid-November, 1969?

A No, sir, I'm not -- it's not my business.

Q Yes, well let us work on an assumption that it did not for a moment.

A Yes.

Q Let's work on the assumption that it's a good possibility that you were in that office since 1969. Can you tell me how there was a sign on the door which said, "Do not enter, East Coast Cinematics", when there was no East Coast Cinematics?

MR. KASSNER: Objection, your Honor.

THE COURT: Sustained. Stop arguing with the witness.

A I said five or six years.

THE COURT: Wait. Next question.

Q MR. LEVITT: No further questions, your Honor.

THE COURT: You may step down. Next witness.

F R E D E R I C K H A M I L T O N S A I N T H I L L,

called as a witness by the Defense, having first been duly sworn, testified as fcllows:

DIRECT EXAMINATION

BY MR. KASSNER:

xx Q Mr. Sainthill, in 1972, by whom were you employed?

A East Coast Cinematic.

Q In January 27, 1972, where were you employed?

A East Coast Cinematic.

Q Where?

A At 210 West 42nd Street.

Q What did you do then?

A What I do there? I maintenance mechanic, take care of the machines, do anything general, treat films.

Q Would you describe to the Court the premises at 210 West 42nd Street?

A It's from the street level, there is a bookstore, and behind the bookstore there is a bunch of peep show machines, and behind that there is a work area with the treatment machine; and there is a stairs that go down to the basement.

Q And downstairs in the basement?

A In workshop down there.

Q Where was East Coast Cinematics' premises in that area you just described on January 27, 1972?

A Behind the peep show machines. You come in the bookstore, you reach to the peep show machines and there is a wall and a big door, and benind that is the treatment machine.

Q Is there any wall between the peep show machines and the premises of East Coast Cinematics?

A Yes, there is a wall and there is a door there.

Q Is that door ever left open?

A No, never.

Q Is that door always locked?

A Always locked.

Q Is it always double locked?

A It's always locked, locked with a key.

Q Do members of the public come right up to that door on the other side of it?

A No, nobody enter there, only employees.

Q But they can't get in but do they have access right up to that door?

A Right up to that door, but beyond that door, no, there is a sign on the door that says, "East Coast Cinematic, do not enter."

Q Okay. I'm not interested in the sign that there is now. What sign was there on it on January 27, 1972?

A There was always a sign there from when I go to

work .

Q Same sign?

A Yes, saying the same thing.

A Who put that sign up?

A I think one of the workers did.

Q What did the sign say?

A "East Coast Cinematic, do not enter."

Q On January 27, 1972, did somebody enter?

A Yes, I was working on the treatment machine, and I heard a kicking on the door.

Q A what on the door?

A Kicking.

Q Kicking?

A Like somebody banging on the door, breaking the door in. And I looked around, I looked around, there was this officer, I know the officer because he came in, break the door in, came in with a gun in his hand, and ask me, "What's going on back here?"

Q Which officer is that?

A Officer Gray, I think, the officer that was here.

Q What was the color of his hair?

A Red, and --

Q He had a red beard?

A Yes.

Q What did he say to you when he came in?

A "What's going on back here?"

You know, and I said, "Like what? I'm treating the films here."

And he said, "And what's down there?"

I said, "Our workshop is downstairs."

He said, "Come on, let's go down there and see what's down there."

So most naturally I accompany him down, let him down there.

He said, "What's in there?"

I said, "A workshop."

He said, "Open it up," and I open it up.

Q Was anybody with him?

A At the first instance, no.

Q Then what happened? You were downstairs?

A Yes. Then he brought me back up, and there was other officers I presume, a lot of plain-clothes men, and they came in and one officer in question, I think his name is Sgt. Horman or Mr. Horman or something like that, he came, he said, "Look what we got here."

He said, "Yes, this is what I been looking for a long time. I found it. Notify the D.A. that I found what I am looking for a long time ago."

Q Did he tell you what he had been looking for?

A He said a reproduction machine, make film, you know.

Q He thought that machine made films.

A He apparently -- he said he thought it made film, copies. I told him no, not a copy processing. Just cleaning processing machine.

Q Then what happened?

A Well, they all pour in, took me down, I was down and I was up and they was having little conference among themselves, tell me to stand by and I be up and down there for hours.

Q They kept taking you up and down from the basement?

A Yes, yes.

Q Then what happened?

A Then I was there, they was searching the place, they was looking at the films and all that kind of stuff.

Q Were they opening up the boxes?

A They were doing everything. Everybody was -- the whole crew. I didn't know who was who. You would think the newsmen were in there.

Q A newsman was there?

A A newspaperman came in at that time.

Q How many cops were there?

A There were after that the uniform cops came in and I noticed they told a cop, a uniform policeman, to stay with me, see, and then I come to the bathroom, and he comes to the bathroom. Then I realize I will probably be detained or something, you see.

Q Did you see Mr. Jones that day?

A Mr. Jones came in after he phoned in, and the officer answered the phone, and I guess Mr. Jones wanted to know what was going on; so he said he wanted to speak to me, apparently, so the officer let me speak to him. And he said if I was hungry or anything like that. I said, yes, I was, I am, because I been here a couple -- a few hours now.

So he said, "Put the officer on, let me ask"-- if he could bring me in some coffee, something like that, and he said yes, he could.

And after Mr. Jones came in, then he asked him who he was, and he said, well, he was the guy in charge of the shop or something like that, and he was also detained.

Q Did you know when a district attorney came to the place?

A Well, I heard them say that Mr. Jacobs, a district attorney, came.

Q Were you there when he came?

A I was there, yes.

Q About how many hours after they first came into that place did Jacobs come?

A He came about two hours after.

Q And all that time they had been searching?

A Yes, they been searching; looking all around, had me waiting on one side, cop standing with me, and they be up and down.

Q They'd search downstairs and upstairs?

A That's right.

Q When they came in the door, how did they get in the door?

A I said they break the door down. Kick the door open.

Q They kicked the door open?

A Yes, the door that comes in from the peep show machine.

Q How long was that door -- how long did it remain broken?

A Oh, well, it remained broken until after we returned to work about three or four days after.

Q Who fixed the door?

A I think Mr. Jones did.

Q Were you there?

A No, well, I wasn't there at the moment he was fixing

it, but I know it was repaired.

MR. KASSNER: All right, I have no further questions.

xxx CROSS-EXAMINATION

BY MR. LEVITT:

Q Now, Mr. Sainthill, I believe that you stated that for as long as you worked there at 210 West 42nd Street, there was a sign on the door that said, "Do not enter, East Coast Cinematics"; is that correct?

A Yes.

Q When did you first begin to work at that address?

A About '69.

Q Early or late?

A Late '69.

Q How late?

A About December.

Q About December?

A Yes, I think, more or less.

Q So that that this occurrence, January of 1972, it was just a little over two years since you began to work there; is that correct?

A More or less, yes.

Q Give or take two months; is that correct?

A Yes.

Q During that time, 1972, what was your position

again?

A Maintenance, regular maintenance man, repair projectors, do anything that's necessary.

Q Who was your supervisor?

A Mr. Jones.

Q Do you know who Mr. Jones' supervisor was?

A I guess the office, Mr. Herb Levin, I think.

Q Are you stating you know it was Mr. Levin?

A I know Mr. Levin, yes, I work with him.

THE COURT: He says he knows Mr. Levin.

Q He knows Mr. Levin?

A Yes.

Q Do you know who Mr. Jones' supervisor was though?

A Well, I guess it had to be Mr. Levin or Mr. Hodas, one of the two. Gets his orders from --

Q You say you guess?

A Yes, I guess.

Q You don't know?

A I have to be.

A It just has to be?

A Yes.

Q Did you ever see Mr. Hodas at that store during this period of time?

A No, he generally be at his office. I generally

see him at his office.

Q Where was that?

A At 113.

Q West 42nd Street?

A West 42nd, yes.

Q Not generally at 210 West 42nd?

A No, no.

Q Did you see Mr. Levin at 210 West 42nd Street?

A Sometimes now and again.

Q I can't hear you.

A Sometimes now and again not very often.

Q At that period of time?

A At that -- you mean in '72?

Q January, '72.

A No, no.

Q Not then?

A No, not then.

Q Up at the office?

A I didn't see him at the office. I didn't see him that day.

Q No, not on the particular day, but in general?

A Yes.

Q In January of 1972?

A Yes, if I have occasion to go up there, I see him

up there sometime.

Q Where, at 113 West 42nd?

A 113, yes.

Q How about at 210 West 42nd Street?

A Sometimes he come around there. I don't know.

Q How often?

A Well, often, I can't say how often, but I see him come around sometimes.

Q Once a week?

A I'd say maybe two, three times a week.

Q Two or three times a week?

A Yes.

Q What would he do?

A What would he do there?

Q Yes.

A Well, I don't know what he's doing there. He comes and he talks to the supervisor, not me.

Q Do any work there that you saw him do?

A No. Not in the shop.

Q Does he have a desk there?

A No, sir.

Q Does he have books there?

A No, sir.

Q So he'd just come by and talk to his supervisor?

A Yes.

Q Do you know about what?

A No, I never know. It's not my prerogative.

Q How many people were employed at that time at those premises that repair premises at 210 West 42nd?

A I think about six or seven.

Q And in January, 1972, you state the office of East Coast were at 113 West 42nd Street?

A That's right.

Q How long had they been there?

A I can't directly say how long they been there, but I know this removed from 133 and went up to 113. I don't know the date. I can't say the time, but they be there.

Q Putting aside the date, can you approximate how long before the date of January 27, when the police came to 210 West 42nd Street, the office had been moved?

A I don't have no idea. I can't recollect how long more or less.

Q Would it have been years?

A About a year, year or so. About a year, year-and-a-half or something like that.

Q Could have been a year or year-and-a-half?

A Yes, maybe two years. I don't know. I never keep track of it.

Q Can you say or can you not say?

A No, I can't say.

MR. KASSNER: If your Honor pleases, he's been saying he does not know, and he does not keep track.

THE COURT: Sustained.

A That's right.

Q Now among your duties, sir, did you go to the office, 112 West 42nd Street, to pick up films?

A Sometimes I go up to the office, if I'm called up there.

Q And would you pick up films?

A No, I don't pick up films.

Q You never pick up films?

A Not that I ever recall.

Q Tell me, sir, after January 27, 1972, did you appear before a grand jury for the State of New York?

A That's right, yes, sir.

Q Did you give testimony at that time?

A I did.

THE COURT: What's the date, Mr. Levitt?

Q Was that March 30, 1972?

A I think that's the date.

Q At the time that you gave that testimony, sir, did you answer truthfully?

A I think I did, to the best of my ability.

Q Indeed, had you received immunity from the State for prosecution by the State as to anything you might say?

A That's right.

Q Let me show you page 51 of what purports to be a transcript of your testimony, sir, the lower half of the page commencing with:

"Q Who did you pick up the films from?"

Read to the end of the page, please.

A That's right.

Q Does that refresh your recollection as to whether or not you picked up films from the offices of East Coast?

A Sometimes. I go up there when I'm called up there.

Q And you picked them up?

A If they give me a parcel, I bring them down.

Q Where do you bring them?

A To the shop downstairs.

Q And what do you do with those films at the shop?

A Well, if I'm told to take care of them, process them, I did. Otherwise I just leave them there and somebody else might do it.

Q And by processing, what do you mean?

A Coating them through that coating machine and putting them in the cartridge so that they be able to work

smoothly.

Q And once this is done, sir, thereafter, what do you do with these films?

A Well, I do what I'm told to. I do what I'm told to do.

Q What do you do with them?

A Oh, if I'm told to put them in a machine or something like that, I do what I'm told, put them in a machine. Put them in the peep show machine.

Q At 210 West 42nd Street?

A That's right.

Q Do you go to other places around the area and put them in?

A Yes, we have other places.

Q You stated that before the wall and door, where you do this work, there are peep show machines?

A Yes.

Q In front, right?

A That's right.

Q Do you know who owns them?

A At that time?

Q Yes.

A I don't know if -- I don't know who owns them. I Know that they were there. I don't know if Mr. Hodas owned

them or whoever.

Q Did you service any of those machines?

A That's right.

Q So you put it in and you changed the films whenever necessary?

A That's right.

Q And you repaired those machines whenever necessary in front of that store; is that correct?

Q That's right.

Q Do you know Mr. Scotti, Alfred Scotti?

A Yes, I know Scotti.

Q Did you know him back in '72?

A Yes.

Q Were you servicing the machines back in 1972?

A, That's correct. To be exact, I met Mr. Scotti down the station that night. When they took me down there, Scotti was down there for some reason.

Q Before that time you hadn't met Mr. Scotti?

A I see Mr. Scotti everyday in the store.

Q And there were times that you know of when you were servicing these machines?

A Yes.

Q When Mr. Scotti was also present in the store?

A Scotti always was there. He worked there. He was

always there. But I don't know who he is or what he's supposing to be in the store. I know he was working there.

Q He was there though?

A Yes.

Q And you worked for East Coast, did you?

A That's right.

Q Mr. Scotti know that?

A I guess he do.

Q You talked to him about what you did, right?

A Scotti?

Q Yes.

A No, I never talked.

MR. KASSNER: Your Honor, I object to what Mr. Scotti knew and what he didn't know.

A I never talked to Mr. Scotti.

THE COURT: He asked whether this witness told Mr. Scotti.

Q Did you ever tell Mr. Scotti?

A No, we never, myself and Mr. Scotti never discuss any arrangement or anything. I don't work with Mr. Scotti. I never discuss anything with him.

Q No, you misunderstand me. I don't mean discuss your arrangements. Did you tell Mr. Scotti how you were employed? Did you ever discuss that with him?

A No, I never had to. Never had a reason to.

Q Did he ever ask you what you were doing with the machines in the front portion, the public portion of East Coast?

A No, he knew that I worked for East Coast and we serviced the machines so he never asked me what I'm doing there.

Q Let me again show you what appears to be your transcript of testimony before the New York State Grand Jury, particular page 28, first question and answer, and ask you if you would read it to yourself, please.

(Pause.)

Q Have you read those questions and answers, sir?

A Yes, so far.

Q The first question and answer?

A Yes, so far.

Q Does that refresh your recollection as to how long you had worked at East Coast at the date that you gave this testimony?

A Yes, to my recollection I think it was about '68 I started to work for East Coast.

Q About '68?

A Yes.

Q And you have also testified, sir, that as far as

you know, while you always work at East Coast Cinematic, there was a sign on the door at 210 West 42nd Street that said, "No admittance" or "East Coast Cinematics, Inc."?

A No, there was always a sign there. There was always a sign on that door because we keep the door locked, because the people that come in and look at the movies, they always have a tendency to stray inside.

Q Please, sir, I just asked you: Was that your testimony, that there was always a sign that said, "Do not enter, East Coast Cinematics?

A There was always a sign that said, "East Coast, do not enter."

A Are you aware, sir. that prior to November 18, 1968 --

THE COURT: It does not make any difference what he's aware of.

MR. LEVITT: All right, your Honor.

Q Now on the day that the police came, sir, to that office, January 27, 1972, were you in that portion of the premises where East Coast was?

A I was at the treatment machine. I'm the one that was doing the treatment of films.

Q At the treating machine?

A Yes.

Q Was there a film on that machine?

A Yes, there was.

Q What was the name of that film?

A They had one film I got to know the name of it, but I think Mr. Jacobs looked at it and said it was Nurse's something or the other. Nurse's Aid or something

Q "Sex Nurse"?

A "Sex Nurse" or something like that.

Q Did you look at that film?

A No, I didn't look at the film

Q You didn't look at the film to see what was -- what the name of the film was?

A Yes, I did, after Mr. Jacobs look at it, made me look at it.

Q And when you looked at it, what did it say?

A It says, "Sex Nurse" or something like that.

Q Now, at the time that the police came into your office or your area, your work area, were there three boxes on the floor near you?

A What kind --

Q Film boxes.

A Film Boxes, there were several film boxes on the machine sitting on the machine.

THE COURT: You mean on the table?

THE WITNESS: You see, sir, it's a table like this, but it's a machine on the table. You know the whole thing is one, see, and it was sitting like all this is sitting there.

BY MR. LEVITT:

Q And one of those boxes, those film boxes, did it bear the name "Piss on Susan"?

A Not to my recollection, sir.

There were no such things that name.

Q Let me show you page 39 of your transcript beginning with the last -- next to the last question on that page, and running on to the following page through the first answer and ask you to read that passage to yourself.

A It says here the I said, "That's right, but I don't remember seeing those films. Something went wrong here."

A You have no recollection of it at this time; is that correct?

A No, no.

Q Sir, --

A I remember only one film that I really looked at.

Q Do you presently have a recollection of whether or not there was a box or boxes at the time near you which had on the title "Piss on Susan"?

A No, sir. I did not.

Q You don't recall?

A No, I don't recall it. I only recall --

Q When you testified before the grand jury --

MR. KASSNER: Your Honor, could you let him finish his answer?

THE COURT: No, because it's not responsive to the question.

MR. KASSNER Oh.

THE COURT: He's being asked what he recalls. Not what he does not recall.

BY MR. LEVITT:

Q When you testified before the grand jury, sir, did you testify truthfully as far as you know?

A As far as I know, sir.

Q And were these questions put to you and those answers given by you:

"Q Mr. Sainthill, am I correct that these three items are three empty boxes, one says, "Sex Nurse" and one says, "Piss on Susan" and one says "Nurse's Aide"?

"A That's right.

"Q Am I correct that they were found next to where you were working?

"A Yes, I have seen these before."

Were those questions put to you and did you give those answers?

A Those questions were put to me in rapid succession, I suppose, and I answered to it, I told him that I only recall one film and through his looking at that film on the machine, that I looked at the name, I told him that I never looked at the names of the films on the boxes.

THE COURT: You're not being asked that question. You appeared before the grand jury, and you were under oath and you're being asked were you asked the question which the assistant United States attorney was asking you now, and can you give the answers which he's reading from the trancript of your testimony before the grand jury.

THE WITNESS: Well, if it said that, that's maybe what I answered, I guess.

Q Why don't you take a look at it again and tell me, did that occur?

(Pause.)

Q Mr. Sainthill, can you now state, were those questions asked of you and did you give those answers?

A Those questions was asked of me.

Q Did you give those answers?

A I answered --

Q Yes or no, please. Did you give those answers?

A Yes, I answered.

Q Now these film boxes in which the films came, sir, at times did they have pictures that are stills taken from frames of the pictures which were contained therein?

A Sometimes they have stills, yes.

Q Now from where your machine was at that time, that is, the shellacking machine, to that door which you say was always locked, what was the distance?

A About six, seven feet, eight, something like that. Not very far.

Q Does that door open up, or when you open the door up, do you pull it open?

A The distance of that machine is about as far as where that door is where you are out there.

Q From where I am to the courtroom door?

A Yes, more or less, yes, and when you open it it comes in.

THE COURT: You push it in, do you mean?

Q You push it or do you pull it?

A If I'm on the inside, you pull it in, pull it to me.

THE COURT: All right.

MR. LEVITT: I have no further questions, your Honor.

THE COURT: Any redirect?

REDIRECT EXAMINATION

xxx BY MR. KASSNER:

Q Mr. Sainthill, did you ever hear of East Coast Cinerama, Inc.?

A East Coast Cinerama? I think I heard of East Coast Cinerama.

Q If I told you that that was the name of the corporation before East Coast Cinematics, Inc, would that help you remember?

A Yes, it could be, yes, that's right, East Coast Cinerama.

MR. KASSNER: I have no further questions.

THE COURT: You may step down.

(Witness excused.)

THE COURT: How many other witnesses do you have?

MR. KASSNER: Three.

THE COURT: How long will they take?

MR. KASSNER: Direct, a total of a half hour.

THE COURT: We'll adjourn then to tomorrow morning at ten o'clock. I have lawyers in another case upstairs witing for me. I have just been informed.

Tomorrow morning, ten o'clock.

MR. HODAS: Your Honor, my wife has a slightly

terminal illness. We have an appointment tomorrow at the Lahey Clinic. You have to wait like about two, three months to get an appointment. She's been in bed now for about six months without getting out of bed, and it's like slightly imperative because her condition is not very good.

THE COURT: When are you going up there?

MR. HODAS: Supposed to go tomorrow morning. She could go by herself, but --

THE COURT: Oh, get on the stand now.

MR. HODAS: Thank you, your Honor.

M A R T I N J. H O D A S, a defendant called as a witness in his own behalf, being first duly sworn, testified as follows:

MR. KASSNER: Your Honor, this takes me as a bit by surprise. Can I speak to him for two minutes before I put him on?

THE COURT: He's your client for how many months?

MR. KASSNER: I didn't expect him to go on at this point today. I expected him to go on tomorrow because he was going to be my last witness, so if you give me two minutes --

THE COURT: Go ahead.

(Pause.)

DIRECT EXAMINATION

BY MR. KASSNER:

Q What is your occupation?

A I guess I'm the officer of a few corporations.

Q What does East Coast Cinematics do?

A Well, they basically operate peep show machines.

Q Do they lease space at 210 West 42nd Street?

A Now they do. They didn't always.

Q In January 27, 1972, did they lease space?

A Yes.

Q What was the space they leased at those premises?

A Well, they leased the back area of the room; the back area there is a bookstore and then you have an area there that has peep show machines and then there is another area that has a shop.

THE COURT: Which portion did you lease?

THE WITNESS: Oh, we leased them both, your Honor. In other words, we leased the portion with the peep show machines and the portion, the other portion.

Q What was done in the rear portion of the premises?

A Well, it was basically the shop that was -- had a treating machine and downstairs in the cellar we used for storage and for repairing of projectors.

Q You say a treating machine. What is a treating machine?

A It coats the film with a wax coating to make it

more easily -- slide more easily on a cartridge. Doesn't break as often.

Q Was there any other treating machine in midtown New York?

A Not that I know of.

Q At that time, for whom did East Coast Cinematics treat film?

A Just about everybody that owned peep show machines in New York.

Q People would send their film to East Coast Cinematics for treatment on these machines?

A That's right.

Q Approximately how many different people or how many different entities?

A Well, there was only about -- when I say "everybody", there was only about three or four other guys that had machines there. The same as today. There is only about maybe five or six today.

Q You have heard the titles of three films, "Sex Nurse", "Piss on Susan" and "Superman". Were they your films?

A No.

Q When you got films in for treatment, did you concern yourself with the names on the films?

A No, didn't concern ourselves with the names. We

never looked at them. Just brought them down to the shop and had them treated.

Q How often did you go to the shop?

A Maybe a couple of times a week, some weeks two, three times, some weeks one, two times. It varied.

Q Who was in charge of the shop?

A I would say Timmy was, Timmy Jones.

Q What did Mr. Levin have to do with the shop?

A Well, it was a series of, you could say, authority. In other words, Mr. Levin was under me and Timmy was under him.

Q Wasn't Mr. Levin generally in charge of all repair work?

A Yes, Mr. Levin was the one that mostly went to the shop. I more or less had a lot of things to do. Mr. Levin's things weren't as many as mine.

Q Where were your main offices?

A At that time?

Q January 27, 1972.

A It was at 113 West 42nd Street.

Q Would you describe the premises at 113 West 42nd Street?

Q Well, you walked in, and there was like a large room and then there were two other rooms, and the rooms were

not connected by any door or anything. They were like one space, and Herb had his office, his desk, on one side and I had my desk on the other side, because we had moved from an office that was only one big room and his desk was here. That desk was side by side. This is how we were accustomed to an office. We had just moved about a month prior to that.

Q You were accustomed to working face to face?

A Side by side, right. In other words, we needed to communicate all the time.

Q On January 27, 1972, did anything unusual happen that you became acquainted wi h?

A Well, yes, I got into work, and I was informed that -- well, I had -- I was informed that my office was broken into and occupied by the police.

MR. LEVITT: Objection.

THE COURT: Sustained.

Q Don't tell what you were informed. Was there anything that happened to you or that you saw?

A Well, I proceeded to go up to my office as usual.

THE COURT: Where is that?

THE WITNESS: 113 West 42nd Street.

THE COURT: Go ahead.

BY MR. KASSNER:

Q When was this?

A On that date you mentioned.

Q The 28th?

A I think it was on a Thursday; was it, or a Friday.

I had known something had happened, because I saw Horman on television the night before that stating that they had broken into the premises, it was on television.

Q So you went up to your office and what happened?

A It was occupied, the elevator opened and there were cops all around and I went right down again. I didn't know what it was all about. I hadn't heard that they broke into --

MR. LEVITT: Objection.

THE COURT: Sustained.

Q When was the first time you were able to go back into your office?

A About six days later, five or six days later.

Q Until that point, could you get -- did you attempt to go back into your office?

A Yes, many attempts.

Q What happened?

A They wouldn't let us in. There was constant communication that Gray had been calling me and Gray had called up, got hold of me, I think, about two days later and said that we were under arrest and he'd respond to --

MR. LEVITT: Objection.

THE COURT: Sustained.

Q Do you know what papers were taken from your offices at 113 West 42nd Street?

A Excuse me?

Q What papers were taken, if anything?

A Every single piece of paper, book, article in the office. It was bare.

Q Were you able to operate your business after you returned to the office five or six days after the initial entry?

A No, no, there was no -- there was nothing there, nothing at all.

Q Did there come a time when you were able to resume your business?

A Yes.

Q When was that?

A We went to Federal Court and got an order to go ahead and have all the books and records returned and everything.

Q There has been testimony that the films "Sex Nurse," "Piss on Susan" and Superman" or at least eight to ten prints of all or some of these three, were found at the premises at 113 West 42nd Street occupied by East Coast Cinematics, Inc.

To the best of your knowledge, were those films on that premises or any of them on the premises?

A We never look. In other words, a guy would go ahead and bring over film to be treated and say, "We got 20 film to send over," and they sent over 20 film. We didn't ask them the names.

Q He wouldn't tell you the names. He'd just say --

A The names were not asked. It's not important. What difference does it make if it's a Mickey Mouse film or a Shirley Temple or if it's a hard-core film. I mean, whatever was sent over we treated. No one looked at it. We didn't screen them first. We didn't put them in a projector. They went on and put in the treating machine. You can't see what they look like on the treating machine and unless you want to, like I say, hold them up to the light, but the men don't have -- don't hold everything up to the light. There were like hundreds of films being treated there.

Q Is it possible to see an explicit from a simulated film on an eight millimeter holding it up to the light?

A It would be pretty tough. Let's put it that way. In other words, you hold it up to the light and you went real slow and looked at the whole thing, it would be very, very rough. I'll put it to you that way.

Q But you didn't do that?

A I never looked at a film that ever went on any of my machines.

Q How about the film that was sent in for processing by other people for a coating by other people?

A That went -- the only -- that film usually went directly to the shop. The film that was sent in from our office was film that was delivered to us by film that we had made, that went up to our office and then it was picked up at the shop.

Q And the film that was sent in from other people who ran the machines in the area went directly to the shop?

A That's right.

Q And you never even saw it?

A No, never saw any film. No reason for it to go up to the office first. Went right to the shop.

Q Now, the papers that were seized from your office, where were they seized from?

A All over the place. Just every single -- they had ripped the paneling off the walls. They had taken --

MR. LEVITT: Objection.

THE COURT: Why?

MR. LEVITT: Defendant was not there at the time. He's speaking of facts of which he has no personal knowledge.

THE COURT: I assume he's talking from the time

when he claims he was first able to get back in.

MR. LEVITT: The defendants claim that they, meaning the police, ripped panels off the walls.

THE COURT: I will take it.

A When I first was allowed to enter back into my office, there was nothing at all in the office. In other words, the office was bare. Every single desk had everything missing from it. Every filing cabinet had everything missing from it. Every closet had everything missing from it, and like I say, the panels were ripped off the walls.

Q And you say you recovered your papers pursuant to order of this court; is that correct?

A That's correct.

Q Were you acquainted with the door between the bookstore premises at 210 West 42nd Street?

A Yes.

Q And the workshop premises?

A Yes, I'm very well acquainted with it.

Q Is there anything on the door --

A Yes.

Q -- which would indicate the name of the operator of the premises behind the door?

A Yes, sir.

Q The workshop premises?

A It was a do not enter sign and East Coast Cinerama which I believe is what's confusing, you know, the other people. My company used to be called East Coast Cinerama and then Cinerama sued me, Cinerama itself sued me and forced me to change the name to Cinematics. So after the name was changed to Cinematics, there was always a sign up there from the time we went in there, it says, "Do not enter, East Coast Cinerama" and then I remember at my instructions, and I spoke -- usually I'd give my instructions to Mr. Levin, I'd say, "Have the name changed." All our names were changed all over. Stationery was changed. Everything was changed. We went into a complete transformation. It became known as East Coast Cinematics.

Q But that was always on the door?

A Always on the door from the day we moved in there, East Coast Cinerama was on the door. And then there came just one day that it was changed to East Coast Cinematics.

Q Did there ever come a day that you went down to your workshop at 210 West 42nd Street and found the door to the workshop either ajar or open?

A If there was, I would have fired the man that was in there, because there was all sorts of equipment in there, there was film in there, there was tools in there. If it was open,that means any man, there's usually maybe 30, 40

customers on the other side of the door. It would be absurd if that door was open. That means any customer to just walk in, help himself to something and walk out because our men were only up on the top floor only when they treated film, because the shop was downstairs. The only job that required a man to be on the top floor was for the treating of the film. The shop, the fixing, the fixing of the machines, the fixing of the projectors, the winding of the film, everything at all was done downstairs, so very, very rarely a man working upstairs, maybe just a couple of hours a day, tops.

The door had to be closed at all times. The door was always locked.

Q We've heard talk about obscene films. Up to January 27, 1972, had you or anybody in your organization ever been convicted of a charge?

A No, never, I never had a piece of obscene film on any machine that I ever owned. And I'd like to clarify one other thing. That as far as the film goes, in those days, they started making hard-core film. I refused to put hard-care film on my machines. We would get hard-core film in and we would like to see if we couldn't edit it, and there were times we had had hard-core film in that would have maybe three or four or five seconds, you could say, of some-

thing that could be deemed hard-core.

Q You are talking about explici sex?

A Right, explicit sex. We would edit that. We would edit that out. In other words, you could cut, you could take an explicitly sexual film and you could cut out five or ten or 20 feet which does not have any mannerism, because it's a continual loop and you could make that film a soft-core film by just cutting out that 20 feet.

So, in other words, the name of a film could be on a box, but the film didn't have to be explicit sex. It could have been edited out and we did do that with quite a few films, because in those days everyone was going hard-core. I was the only one in the city, and the fact that I was never arrested up until that time, never convicted of a crime. This was one time I was arrested I think back in 1968 and the D.A. viewed the film and he said it was not obscene, and I -- and the case was dismissed. That was the only time that anyone in my organization dealing with any of the equipment I had was ever arrested.

Q Is there any confusion on the part of law enforcement officials as to where your machines are being -- are working?

MR. LEVITT: Objection.

THE COURT: I don't know what that means.

Q Was there on January 27, 1972, was it well-known where you had your machines in the City of New York?

A Absolutely was, because I had gone --

MR. LEVITT: Object, your Honor.

THE COURT: Sustained.

MR. KASSNER: Your Honor, I'm asking for a reason, the reason being --

THE COURT: Don't testify.

BY MR. KASSNER:

Q If a law enforcement official wanted to determine whether obscene films are being shown on your machines, couldn't he have determined that by just going into a premises in which you had your machines and looking at it --

MR. LEVITT: Objection, your Honor.

THE COURT: I will leave out -- I'll let the question stand except as his machines.

MR. KASSNER: Excuse me?

THE COURT: Except that it's his machine. I had assume he can tell by going into any peep show store and learning --

MR. KASSNER: That's exactly right.

THE WITNESS: Can I clarify that?

THE COURT: You can't say that's his machines as opposed to anybody else's.

THE WITNESS: Your Honor, it's very simple.

MR. KASSNER: They knew which were his machines and which were other people's.

THE WITNESS. Yes, your Honor.

THE COURT: Just a second. Yes nothing.

THE WITNESS: Excuse me. You had the policeman on the stand. You could have asked him the question. You did and he said no; so what he knew.

BY MR. KASSNER:

Q Is there any reason you believe that the law enforcement officials in the City of New York knew where your machines were located?

A Yes.

MR. LEVITT: Objection.

THE COURT: I'll let the question stand.

A Yes.

Q Would you tell the judge how?

A We had our name and telephone numbers on every single machine that we owned.

We had a sticker on every single machine we owned.

Q East Coast Cinematics, Inc.?

A That's right. It was East Coast Cinerama and then like I say when the name changed, it was changed to East Coast

Cinematics.

Q So if a police officer wanted to see whether you were distributing or exhibiting obscene material, all he had to do was go over to a machine with your label on it and look into the machine after putting in a quarter; is that correct?

A The label said, "For service call East Coast Cinematics" or "Cinerama," and our telephone number on every single machine we owned, a silver label.

Q In other words, you weren't running a hidden business at that time?

A Absolutely not. Business was out in the open; and like I say, no one that every worked for me ever got arrested.

MR. KASSNER: I have no further questions.

THE COURT: You may cross-examine.

CROSS-EXAMINATION

xx BY MR. LEVITT:

Q Mr. Hodas, you were stating that where there was film which was hard-core, because of ten or twenty feet which amounted to four or five seconds, you could edit that and thereafter it became soft-core?

A That's correct.

Q And at that time, that's back in January, 1972,

the big fad in the peep show films were hard-core; is that correct, so you had a problem?

A No, that's not correct. I don't understand what you mean by that.

Q Well, you stated everybody was showing hard-core films.

A That's right, everybody was showing hard-core except me, absolutely.

Q Except you?

A Absolute fact. Mr. Jacobs knows that, because he had discussed with me.

Q Excuse me, Mr. Hodas. Just answer the questions, please.

THE COURT: Come on. Strike that.

A Yes, that's right, that's the answer I give.

Q Can you name one film you edited in January 1972 to make it soft-core?

A No, I couldn't.

Q Thank you.

A No, I couldn't.

Q The function of 210 West 42nd Street was to coat these films and repair peep show machines; right?

A Yes. Basically.

A And these films were coated for other persons and

other corporations and East Coast?

A That's correct.

Q And East Coast had its own machines;is that correct?

A Yes, that's correct.

Q Who did the buying of the East Coast films?

A Who did the buying?

Q Yes.

A Most of the film came from a Bob Wolf that we used.

Q As what, was he the seller or was he the purchaser?

A No, he was the seller.

Q Who purchased on behalf of East Coast? Who said, "I'll take that film or this one."

A I imagine it was Mr. Levin.

Q To the best of your recollection, was it Mr. Levin?

A Yes, it was Mr. Levin. The only thing is to clarify that, most of the film like I say came from Bob Wolf; and Bob Wolf only made what's called soft-core film. Once in a while we did get some other film from out of town. It was first edited by us to see if there was any -- you could say -- hard-core that might have been slipped in, a little

bit of it. If we needed the film, we cut it out, and we put it on the machines.

Q Mr. Hodas, you have answered my question.

A Okay.

Q It was Mr. Levin. Do you know an individual whose nickname is Fast Ed?

A Fast Ed?

Q Yes. Do you know him?

A Certainly I know Fast Ed.

Q Where is he from?

A Philadelphia.

Q Does he work for you?

A No.

Q Did he?

A No.

Q Did he work with you?

A No.

Q Was he up in your offices?

A You mean did he have an office up there?

Q No.

A No. Was he ever up there?

Q Yes.

A Yes.

Q Was he up there in the time of January 27?

A I couldn't remember that.

Q What was he doing up there when he was up there?

A I didn't say he was up there. I said I don't remember.

Q When he was up there what was he doing up there?

MR. KASSNER: If your Honor please, I don't understand relevancy of Fast Ed or whatever his name is to the case at bar.

THE COURT: I assume we'll find out.

MR. KASSNER: This is a question of illegal search and seizure.

THE COURT: I assume we'll find out.

A Fast Ed was in Philadelphia, I believe at that time he brought in film to be treated. I think he would to ahead bring the film in to be treated, maybe he would come up to the office and sit around and hang out there for a little while.

Q Where did he bring the film to?

A To the shop. Sometimes maybe he brought it to the office and it was picked up at the shop, but like I say it was never viewed or anything.

Q Was he a very big client of yours?

A No big client? No, he wasn't a big client.

Q Small client? Good.

A Client.

MR. KASSNER: Again, your Honor, I object. I don't see any relevance to this.

THE COURT: I think we have enough of it.

Q Did you have a person by the name of Kenny who would also purchase films for you?

MR. KASSNER: Objection, your Honor, on the grounds that the purchasing of films --

THE COURT: What is the purpose of all this?

MR. LEVITT: Your Honor, what I'm trying to do is to establish the size of the purchasing activities of these peep show films by East Coast for itself.

MR. KASSNER: What has this got to do --

THE COURT: He says he bought most of his stuff from Wolf.

A Kenny was in the army.

Q I'm asking if there was a person named Kenny who also acted as a purchaser for East Coast?

A He was in the army then. Okay?

THE COURT: He says he was in the army in January '72.

MR. KASSNER: Your Honor, I still don't understand the relevance of the questions.

THE COURT: He's trying to find out where he got

the stuff from, attack his credibility on whether it was only soft stuff. He says Wolf is one guy. He denies that the other fellows sold stuff to him, only brought it in to be treated.

Q Now, the films which were purchased on behalf of East Coast, they were at the office; is that correct?

A The films that were purchased on behalf of East Coast, yes. Yes, that came up to the office.

Q And then they'd be brought down?

A Yes, then they were brought down to the shop, they were treated and distributed. Sold them too.

Q At the time, January, 1972, were you an officer of East Coast?

A Yes, I was.

Q What office?

A I was president.

Q Were you an owner of East Coast?

A I would say I was, yes.

Q How much did you own?

A I think 100 percent.

Q Will you tell me one of the films, the name of one of the films which East Coast bought in the early part of 1972?

A Let me try and remember. Maybe I can remember one.

No, I don't think so. The names change. There was so many ridiculous names and they changed.

MR. LEVITT: Thank you, Mr. Hodas. No further questions.

THE COURT: All right. You may step down.

(Witness excused.)

THE COURT: Ten o'clock tomorrow morning.

(Adjourned to Tuesday, May 20, 1975 at ten o'clock a.m.)

* * *

UNITED STATES OF AMERICA

VS.

75 Cr. 295

MARTIN J. HODAS and
HERBERT J. LEVIN

May 20, 1975

THE COURT: I gather, though there was nothing formal put on the record, that Mr. Hodas has no objection to going forward since he asked to be excused from the proceedings for his own convenience?

MR. KASSNER: Yes, your Honor.

T H E O P H I L U S T. J O N E S, called as a witness on behalf of the defendant, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KASSNER:

Q Mr. Jones, with whom are you employed?

A I am employed with the East Coast Cinematics, Inc.

Q Have you been continuously employed with East Coast Cinematics, Inc. since January 27, 1972?

A Oh, yes, yes.

Q Were you employed by that ccrporation before that date?

A Yes, I was.

Q Were you ever employed by any other corporation to which East Coast Cinematics became a successor?

A Yes, it was East Coast Cinerama. The name was changed, the East Coast Cinerama.

Q What has been your function with East Coast Cinerama and East Coast Cinematics?

A I'm a maintenance mechanic, foreman of the shop.

Q Are you acquainted with the premises at 210 West 42nd Street?

A Yes, I am.

Q Would you describe the premises to the judge.

A Well, it's on the ground floor, street floor, and it's a bookstore plus the machine area further in the back, another room further back. That's closed by a door. It's divided by a door.

Q The premises of East Coast Cinematics, Inc. is what part of the premises that you just described?

A The very last part.

Q The last part?

A Right.

Q Is the bookstore in front open to the public?

A It is.

Q Is the peep show exhibition area behind the bookstore open to the public?

A It is.

Q Does that mean that people roam freely in that area?

A Yes, they do.

Q Members of the public?

A Yes, they do.

Q They scan books, they look at the peep show machines?

A They do.

Q What separates the East Coast Cinematics, Inc. premises from this bookstore and peep show area that I have just described?

A There is a partition and a door, locked door.

Q You say a locked door. Is that door always locked?

A Always locked. We wouldn't want the customers to go downstairs, you know. We're not usually downstairs. I mean upstairs. The only time we come upstairs if like we are using that coating machine. We come up to use the machine and then we're always downstairs repairing projectors and what-not.

Q The repair shop is downstairs?

A In the basement.

Q In the basement?

A In the basement.

Q And most of the time the people in the East Coast Cinematics premises are downstairs, not upstairs; is that correct?

A Usually downstairs. They're in and out making repairs other places, but they are downstairs in the shop.

Q If that door were open, members of the public could walk in?

A That's the reason the door is there.

Q And most of the time there is nobody upstairs in that premises?

A Exactly.

Q So they could take whatever they want and walk out, is that right?

A Yes, yes.

Q That door that you have just described, are there any markings or have there been -- were there any markings on the door on January 27, 1972?

A There always was a marking on there since the partition on the door was put there. There was a marking on there.

Q What did the marking say?

A Originally it was"East Coast Cinerama, Inc., do not enter." And it's been changed. Herb, Mr. Levin

acquainted me with the change once and I made the change to"East Coast Cinematics, Inc., do not enter."

Q When did you make this change -- We will strike that question.

On January 27, 1972 what was on that door?

A East Coast Cinematics at the time.

Q What else?

A It was"East Coast Cinematics, Inc, do not enter." That was on there.

Q Who put that on the door?

A I did.

Q What, if anything happened on January 27, 1972 that was unusual?

A Well, I will have to explain. I was out, I was out to lunch or whatever. I was out anyway. When I came back to the bookstore, the door, the front door of the bookstore was closed; and I saw a lot of police officers milling around in the store; so I heard from one of the fellows that there --

MR. LEVITT: Objection.

THE COURT: Sustained.

Q Don't tell what you heard. Just tell what you did or what you saw.

A Well, I saw the policemen in there and the door

was closed. I couldn't get down to the shop. So I went out to a restaurant next door, couple of doors down and I make a call to the shop.

Well, a strange voice answered, and I asked if Mr. Sainthill was there. I called him Hammy. And they told me yes, he was there. And he was under arrest. So I said, "Well, could I bring him some coffee?"

He said, whoever it was said, "Yes, you can bring him some coffee and bring him a sandwich too, because he will be here for a little while."

Well I did get the sandwich and the coffee and I went down. I knock at the door and I showed him the coffee in the paper bag and the sandwich and they let me in.

I went on down and while going through that area, it was off the hinge, it really was off the hinge, anyway I was.

Q What door was off the hinge?

A The door that's got the stencilling on it,"East Coast Cinematics." and I went down. The officer asked me who I was. I explained to him who I was and he told me that I was under arrest.

Q Did you observe anybody in the East Coast Cinematics premises at that time?

A Oh, yes, they had several officers in there. There

were --

Q What were these officers doing?

A They were milling around, going upstairs and downstairs, and while I couldn't very well move along with them, because as I say I was under arrest, I had to stay in the shop, and sometime that I wanted to go the bathroom, I had to be accompanied, and the bathroom is just outside the shop door.

Q Where did they hold you, in the basement or on the first floor?

A Yes, in the basement, in the shop.

Q Did you notice any police searching in the basement?

A Well, they looked around in the shop; and a lot of the stuff there were, you know, they took, like my logbook that I keep logs in, jobs to be done, jobs finished, and my timebook, and --

Q They took those things?

A Yes, they took it.

Q Did there come a time when you were released by the police?

A They took us to court, not to court, to the precinct, I think it was the 14th Precinct. That was pretty close to eight if it wasn't after.

Q Then what happened?

A Well, we spent the night there, and we went to court.

THE COURT: That's enough on this. This is a suppression hearing on the evidence.

Q Did there come a time when you came back to the place?

A Yes, I came back there two, three days after, because the place was closed for about two or three days. We couldn't go to work.

Q Was the door still off the hinge, the door to the --

A Yes, it was there till I fixed it.

Q You repaired the door yourself with your own hands?

A Yes.

Q What is Mr. Levin's function with respect to East Coast Cinematics, if you know?

A He's my immediate supervisor.

Q Did he ever come to the workshop at 210 West 42nd Street?

A Oh, yes, he's there quite often, quite often.

Q On January 27, in that time, around January 27, 1972, about how often would he come to the place?

A Oh, he'd be there about three, four days a week.

Q Did Mr. Hodas ever come to the place?

A Yes, he comes down there two, three days a week. Sometimes he comes and I am told by the other workers that he was here, but I didn't see him because I was out.

Q Was Mr. Sainthill in the premises at all times at 210 West 42nd Street.

A Not always, he works as a mechanic and we have other jobs on the south side and he's in and out.

Q Were you in and out also?

A Yes.

Q Well, the film coating machine, was it only East Coast Cinematics' film that was coated on that machine?

A No, no, we got other film from other places to coat, and we just coat them. We don't have to look at them or anything. We have a job to do and we do it.

Q You mean you didn't look at the film, you just coated the film?

A Right.

Q And you worked for other companies, I mean you did work for other companies as well as for East Coast Cinematics own film; is that correct?

A Yes, we do, yes.

Q This was in January, 1972.

Now the boxes that were used to house the eight millimeter film, were the names on the boxes always representing the names of the film in the boxes?

A Not really. I have run into several mistakes.

THE COURT: What difference does it make?

A With the --

Q You have looked up at eight millimeter film and you have held it up to the light, have you not?

A Yes, sir.

Q Is it possible, is it possible to see whether there are explicit sexual acts on that film or simulated sexual acts on that film by holding it up to the light?

MR. LEVITT: Objection, your Honor.

THE COURT: Why?

MR. LEVITT: He's impeaching his own witness, Mr. Hodas, who has testified in this matter that it can be seen although with difficulty.

THE COURT: I will take the answer. Objection overruled.

MR. KASSNER: I don't know how I am impeaching another witness.

THE COURT: I said overruled.

BY MR. KASSNER:

Q Yes, Mr. Jones.

Q Well, you would have to look really good there. They are very small frames. The frame on an eight millimeter film is about three-sixteenths of an inch wide, and about the same -- well, square. And it's very small and you'd have to really look for it.

Q Can you see a genital on those films? Can you see a genital on an eight millimeter frame? Is it possible to see a genital on an eight millimeter frame?

A Well, it is possible, but I have down the shop a magnifying glass, and I run it through that because sometimes you really can't see what's there.

Q Did you bring any eight millimeter film with you?

A I didn't bring any.

MR. KASSNER: If your Honor please, we have brought to court today three eight millimeter films. I would like to put them in evidence because some are explicit and some are simulated, and I respectfully submit that while this is quite obvious on a motion picture projection, that it is impossible to tell which is simulated and is explicit by holding this up to the light.

THE COURT: You need three of those to accomplish it?

MR. KASSNER: Excuse me, your Honor.

THE COURT: Do I have to look through three reels

to --

MR. KASSNER: Maybe I can give you two, one explicit and one simulated.

MR. LEVITT: Your Honor, I would object to the introduction of these films at this time. The defendant has already had two witnesses who have testified that it is possible. It is being introduced according to defense counsel, for the concept that it is impossible to detect sexual films. It would be clear impeachment of his own witness' testimony.

THE COURT: If he wants to put it in to clutter the record, he can. Both the government's witness and your witness said they could tell the difference.

MR. KASSNER: If your Honor please, Mr. Hodas, went back and tried to test whether he could tell yesterday.

THE COURT: I don't care where he went. I heard what he testified under oath here, and stop testifying; will you please? You have been doing it all day yesterday and you are trying it again today.

Let's get on with the hearing.

MR. KASSNER: Your Honor, I submit that it's your Honor's determination as to whether he can tell the difference.

THE COURT: Not if your client and since the U.S.

Attorney both agree that it's possible to see it. What's the point of looking at it?

MR. KASSNER: You're not going to look at it?

THE COURT: Obviously not. Not when your client and the government assistant tell me it's possible. There is no issue for me to resolve, but if you want to put it in, put it in.

MR. KASSNER: All right, I'd like to submit this in evidence as Defendants' C and D.

THE COURT: What's the name of it so I can have a record?

MR. KASSNER: There are no names on it.

THE CLERK: It just says "Courtship", your Honor. The other one does not say anything.

THE COURT: All right.

MR. KASSNER: The other one says R.Q. 10, there is a number on it.

THE COURT: All right.

xxxx (Defendants' Exhibits C and D marked for identification.)

BY MR. KASSNER:

Q I show you Exhibit C, the one labeled "Courtship". Is this the typical way that a pack of film is labeled and maintained?

A Usually. Sometimes the pictures are on the inside.

Q Sometimes the pictures are on the inside as opposed to the outside.

The name, is that about the size of the lettering of the name on a box?

A Usually, yes.

MR. KASSNER: I have no futher questions.

xxxx CROSS-EXAMINATION

BY MR. LEVITT:

Q I show you Government Exhibit C again, sir, and ask you if you know where those films came from that are present here today?

A No, sir, I don't, not really.

Q Did you ever see that box or a similar box to that in your place of business at 210 West 42nd Street?

A Do you mean the same picture and stuff?

Q Yes. Doesn't have to be that particular picture but one that is like that, a copy, another copy.

A Oh, I guess so, yes.

Q Excuse me?

A I guess so. You mean this film? This film?

Q Yes, that box, not the box or the film per se, but another copy of that, another picture, another copy of the picture on the box.

A Another copy of the picture of this box? I can't remember it. This picture, we have so many come through there, I can't --

Q Similar? Do you find those similar to that, in your place?

A I'm trying to understand if you mean this same picture.

Q Let's start off with that same picture, yes.

A It's been quite a long time. I can't remember if I have seen this before.

Q It's been quite a long time since when?

A Since January, whenever.

Q I'm talking aobut have you ever seen boxes like that, that picture in your place at any time?

A Oh, yes, I have seen boxes like this. I wouldn't answer to the picture because I don't know if this --

THE COURT: You have seen similar pictures?

A Similar pictures, similar boxes.

THE COURT: And nude men and women in similar positions?

A Yes, I have.

THE COURT: All right.

Q Mr. Jones, you have testified, have you not, that originally the sign on that locked door, as you put it,

was entitled, "Do not enter, East Coast Cinerama, Inc."?

A Well --

Q And that there came some point in time where you were informed by somebody that the name had been changed, and so you changed the sign to East Coast Cinematics, Inc.; is that correct?

A Yes, sir.

Q And you were employed by East Coast Cinematics, are you not?

A I am.

Q And before it was known as East Coast Cinematics, you were employed by East Coast Cinerama, right?

A Yes.

Q And did you get a salary from East Coast Cinerama?

A Yes.

Q What that in cash or in check?

THE COURT: What has that got to do with it?

MR. LEVITT: Your Honor, the prior name is not East Coast Cinerama, Inc.

THE COURT: What difference does it make?

BY MR. LEVITT:

Q You described the layout of 210 West 42nd Street. Can you just again tell me where the bathroom was in terms of behind the locked partition or in front in the bookstore

area?

A There is no bathroom in the bookstore.

Q So it's behind the locked door?

A It's behind the locked door, down in the basement.

Q The machines are stored in the basement; is that correct?

A Yes.

Not all. They have a couple of them upstairs by the treatment machine.

Q But most of them?

A Yes, downstairs in the basement.

Q In the basement?

A Yes.

Q When you take the machines out, you or somebody else to locate them somewhere, do you leave the door open?

A Sometimes.

Q Sometimes you do.

A Sometimes.

Q Thank you.

Now you stated that after the date on which the police were in 210 West 42nd Street, that's on January 27, 1972, approximately two or three days later you finally came back; is that correct?

A Right.

Q And you did not do so before then because you couldn't get in?

A Right.

Q How do you know if you didn't come back?

A I couldn't get in. I came to New York. I live in Brooklyn. I came to New York.

Q How do you know you couldn't get into 210 West 42nd Street during the intervening period from the date that the police were in the place to two or three days later when you finally came back, if you had not during that period of time come and checked it out?

A I did come to New York City from Brooklyn where I lived, and went to the store door several times during those days; and I could not get in there.

Q In other words, you testified, your testimony before that you didn't come back until two or three days later was not accurate; is that correct?

A What I meant --

MR. KASSSNER: Objection, your Honor, that's not what he said before. He said he couldn't get in.

THE COURT: I gather that he came down prior to being able to get in and couldn't get in.

BY MR. LEVITT:

Q What is your position with the company, East Coast?

A Mechanic, maintenance mechanic, foreman.

Q Shop foreman?

A Shop foreman.

Q Is that correct?

A Yes, sir.

Q And as shop foreman, you are in charge of that shop; if that correct?

A I supervise the men's work and stuff like that, yes.

Q Does East Coast have another office?

A 113 West 42nd Street. That's the office.

Q That was the office in January of 1972?

A Yes, sir.

Q Does Mr. Levin have a desk at 113 West 42nd Street?

A Yes, sir.

Q Does he have office space at 210 West 42nd Street?

A No, he does not.

Q As shop foreman you also supervise the installation of films into the machines, the peep show machines?

A Yes, I do.

Q Where do you get the films that you put into those machines?

A How's that, sir?

Q Where do you get the films you put into the machines?

A Oh, I get them from the office.

Q From the office?

A They are sent down or sometimes we pick them up.

Q But always from the office?

A Yes.

Q And when they are sent down, who brings them down when you say they are sent down?

MR. KASSNER: Objection, your Honor, I don't understand the relevance of this question.

THE COURT: Overruled.

A Well, sometimes they call from the office, and I will send a man, whoever is available at the time. Sometimes I pick them up myself. And we bring them and we treat them whenever we get the time. It doesn't have to be the very day.

Q In other words, let me just make sure I understand:

Are you stating that the only way that the films get from the office to 210 West 42nd Street is either you or one of the mechanics who you supervise go up to the office and bring them down? Is that correct?

A Yes, I'd say that's correct.

Q Now, you stated that you get films from places other than East Coast's films; is that correct?

A That's correct.

Q Where do you get them from?

A Well, the people that send them down, usually they are packed in a paper bag or whatever they come with, the number of this place or the address or whatever, and they will call, we'll open the door, and we'll pick it up, and we'll take care of it, you know, coat it.

Q I'm sorry, I don't understand.

They'll call?

A They call from upstairs. Now, they can't come down to the shop with the film. Someone have to call me downstairs, because the door is closed.

Q I believe you have just testified, sir, that the only way you get films into the shop at 210 West 42nd Street is from your office.

THE COURT: No, that isn't your question. You're now asking him about films from other people sent to be coated.

MR. LEVITT: I was under the impression, your Honor, that two questions ago I asked: Do you get films from any other place other than the office.

THE COURT: You have asked him: Does he have any other people. He said yes, other people send them to him to

be coated.

MR. KASSNER: Your Honor, he was testifying as to the films that they put on there own machines.

THE COURT: I gather that to be the question, and the answer was directed to that question, as I interpret it.

BY MR. LEVITT:

Q You are stating you do get films from places other than the office; is that correct?

THE COURT: Let's distinguish on the record. When you speak about film, do you mean film from other displayers who want to have their film coated, from film that his employer wants to use in his own peep show machines.

MR. LEVITT: I'm talking about films from any source, your Honor. Is there any source that comes--

THE COURT: That's too general a question.

Q You obtain films from other parties other than East Coast?

A Yes, I did.

Q And those films are you stating are brought to you or to the outside of a locked door?

A Yes.

Q By the persons who bring them; is that correct?

A Yes, sir.

Q Did you testify before a grand jury in New York

State in March of 1972?

A Yes, I don't know what month it was.

Q Excuse me?

A I didn't know what month.

Q Excuse me --

THE COURT: He didn't know what month it was, but he did testify.

Q But you did testify, and at that time before that grand jury did you tell the truth?

A Yes, I did.

Q Mr. Jones, let me show you page 69 of what purports to be a transcript starting with the question, "Did you ever--" and running through the answer, "Never, no."

Please read that to yourself.

A Yes.

Q Have you read that to yourself?

A Yes.

Q Mr. Jones, in view of what you have just read, was that question which you just read and that answer which you just read, was this a question which was put to you?

A I don't know if it was put to me in the way you just put that question, sir.

Q The question as it is here --

THE COURT: Read it for the record.

MR. LEVITT: For the record, Your Honor.

"Q Did you ever get any other films to put on machines other then films that came from the office at 133 West 42nd street, New York County?

"A Never, no."

MR. KASSNER: That does not contradict what he said, your Honor. It's not to put on machines, your HOnor. It's to coat. He's testifying about coating processing and he's talking about putting films on peep show machines.

THE COURT: I think that's true.

BY MR. LEVITT:

Q Mr. Jones, can you name one other party from whom you obtained films other than East Coast?

THE COURT: For what purpose?

MR. LEVITT: For the purpose of shellacking or putting on machines or in any way processing that film at 210 West 42nd --

THE COURT: Obviously you're all balled up.

If you're speaking about shellacking or processing, that's one operation. If you're talking about receiving them to put in his machines at 210 or other locations, that's another operation. Keep them clear. Because all you do is confuse the witness; and the Court.

Q Can you name one party from whom you obtained films

for the purpose of shellacking those films at 210 West 42nd Street?

A Yes, I can name one party.

Q Name him.

A We call him Sonny. I don't --

Q I can't hear you.

A We call him Sonny. I don't know his exact name. I think his surname is Scotti anyway.

Q Scotti?

A Yes.

Q Alfred Scotti?

A I don't know his first name, sir.

Q The Scotti who occupies the premises of the book-store in the front of 210 West 42nd Street?

A Yes, sir.

Q Did you say that there was a machine area --

THE COURT: Wait a second. Ask him if there is anybody else.

Q Anyone else that you can name who brought films to you?

A There used to be but several of the places have been closed or they don't send it out there anymore.

THE COURT: We're talking about 1972.

A Oh, 1972, well, some place, I can remember one

place but it doesn't have a name. It was a number. It would come down like 1605, just that. And we would know who it was.

Q Do you know?

A That's just a number.

Q Is that an address or something?

A Yes, it used to be an address.

Q 1605 what?

A It used to be 1605 Broadway.

Q Broadway?

A Yes.

Q Where would that be located if you know?

A Broadway and maybe 49th or 50th Street, something like that.

Q Were you ever at that particular location, that is, 1605 Braodway?

A We used -- used to service machines in there.

Q Do you know whose machines they were?

A That the time?

Q Yes.

A They were East Coast Cinematics'.

Q In the front of the store immediately before the locked door, were there peep show machines?

A Sir?

Q Were there peep show machines immediately before the locked door in the front of the store?

A Yes, there were.

Q Whose machines were they?

A Are you speaking of that time and date?

THE COURT: Yes.

Q January, 1972.

A Yes, they were -- at the time I think they were East Coast Cinematics'.

Q And people could walk in. These were operating machines, right?

A Yes, sir, coin-operated machines.

Q How many were there?

A 20, 25, somewhere around there.

Q By coin operating, you mean you put a coin into the machine, some coin and it plays for a period of time; is that right?

A Yes, sir.

Q And when the coin box becomes full on the machine, did you open it up and collect it?

A No, I had nothing to do with the coin part of it. I would --

Q That's okay.

Do you know who did?

A Sometimes Mr. Levin, yes.

Q Mr. Levin?

A Sometimes Mr. Levin.

Q He would come down to the store to empty the coin boxes in the front of the machine; is that right?

A Yes, sir.

MR. LEVITT: I have no further questions, your Honor.

THE COURT: All right. Next witness.

xxxx H E R B E R T L E V I N, called as a witness on his own behalf, having first been duly sworn, testified as follows:

MR. KASSNER: If your Honor please, we brought a projector with us so that you could view these films on a projector and see them and view them up against the light and see them and determine whether you could tell without the projection equipment whether they were simulated or explicit sex.

THE COURT: I told you on the record there is no issue.

MR. KASSNER: All right then, I will send the projector back.

THE COURT: Certainly. I have no interest in seeing the pictures.

DIRECT EXAMINATION

BY MR. KASSNER:

Q Mr. Levin, by whom are you employed?

A East Coast Cinematics.

Q In what capacity?

A As a manager.

Q By whom were you employed at January 27, 1972?

A East Coast Cinematics.

Q What did you do for East Coast Cinematics in January 27, 1972?

What were your functions?

A Day-to-day functions?

Q Yes.

A I would make collections, oversee the work in the shop, plan film changes, and just generally take care of things.

Q When you first went to work for Mr. Hodas or one of his corporations, did you go to work as a mechanic, essentially?

MR. LEVITT: Objection.

THE COURT: Ask him, you know, no leading questions.

Q What services did you perform?

A I originally started as a mechamic.

Q In January of 1972, approximately how many times

a week would you visit the workshop of East Coast Cinematics at 210 West 42nd Street?

A I was in the store daily, and I was down in the shop at least three or four times during the week.

Q Was it your function to make sure that the work got out in that shop?

A I would oversee and make sure that the work was accomplished; yes.

Q Did you have an office at that time at 113 West 42nd Street?

A We did.

Q Did you have a desk in that office?

A Yes, sir.

Q Did Mr. Hodas have a desk in that office?

A Yes.

Q Were -- was your desk separated from Mr. Hodas' desk by an entirely closed area?

A No, there was an opening in the wall.

THE COURT: Wait, wait. Are we in the same room with him or in a separate room?

THE WITNESS: It was a separate room, your Honor.

BY MR. KASSNER:

Q Was there any door between you and Mr. Hodas?

A There was a doorway, yes.

Q But there was no door?

A I don't remember whether there was a door or not.

Q In your desk at that premises, did you keep papers?

A Yes.

Q The papers which were seized from East Coast Cinematics, between January 27 and February 2, 1972, were they seized from around your desk?

MR. LEVITT: I'm going to object, your Honor. It seems to be a very broad question.

THE **COURT:** Please, I assume he has read the inventory as to what was seized.

Q I show you the inventory in the search of 113 West 42nd Street.

A Yes.

Q All that stuff was taken from your desk?

A No, it was all taken from the office.

Q It was all taken from the office.

Can you recognize any stuff that was taken from your desk?

A It's hard for me to say right now. I mean, I usually had several checkbooks on my desk and different record books in my desk. I don't know -- I can't distinguish from this list where the items were taken from.

THE COURT: I don't think there is any dispute that some of the material taken came from his desk. Is that what you are trying to prove?

BY MR. KASSNER:

Q If there is any dispute, a substantial portion of this material was in your desk, was it not?

A It's hard for me to say right now.

THE COURT: He says he can't tell.

A Not from that list.

THE COURT: But there is no dispute that some of it was.

MR. KASSNER: Okay, your Honor.

THE COURT: Is there, Mr. Levitt? Mr. Levitt?

MR. LEVITT: Yes, your Honor.

THE COURT: Is there any dispute that some of the materials taken from 113 came from the desk of Mr. Levin?

MR. LEVITT: The government assumes so, your Honor. We do not know. There was no inventory made by the police.

THE COURT: All right. I assume so too.

MR. KASSNER: Thank you, your Honor. Will the same assumption be made about Mr. Hodas' desk?

THE COURT: Certainly.

MR. KASSNER: Thank you, your Honor.

BY MR, KASSNER:

Q Was part of your job taking care of some of the books and records of the corporation?

A Yes.

Q Was part of Mr. Hodas' job taking care of some of the books and records of the corporation?

A Yes.

MR. LEVITT: I'm going to object, your Honor. It's beyond the scope of the issued before the suppression hearing.

THE COURT: Overruled. Go ahead.

Q When did you first find out that there had been a seizure of these records, books and records of the corporation?

A If I'm not mistaken, I believe the 27th was a Friday, and we had left the office already, and by the time I had gotten home there had been a phone call that someone had broken into the office or -- no, no, that the 210 store was raided, and there was several arrests, and later on that evening I got word that the office was broken into.

Q When is the next time you came to the office?

A Well, I was arrested myself the next morning, on a Saturday morning.

Q You were arrested?

A Yes, I voluntarily turned myself in with Mr. Hodas.

Q Did you get out of jail that day?

A Late that Saturday night; close to midnight.

Q Then what did you do? Did you go near the office? When did you go near the office next?

A I don't think I went back to the office until at least Monday or Tuesday. The office was occupied by police at that time.

Q How did you know that?

A I was told by someone who had gone up there.

THE COURT: Strike it.

Q The next time you went to the office, were there police there?

A I don't recall.

Q Have you attempted to view eight millimeter film up against a light and determined whether you can tell whether it's simulated --

THE COURT: Forget it. Forget it. Hodas says you can do it. I'll take Hodas' story. There is no issue there. Your client Hodas says it can be done, the assistant U. S. attorney says it can be done. Are you going to have him tell me it can't be done?

MR. KASSNER: If your Honor please, if the assistant U.S. attorney and my client told you that the sun sets at 4 o'clock in the morning --

THE COURT: You want to waste the time, put it in.

MR. KASSNER: I think your Honor can determine it for himself.

THE COURT: I don't have to. There is no issue.

MR. KASSNER: Yes, your Honor.

THE COURT: Issues are created by testimony.

MR. KASSNER: Well, I don't think Mr. Hodas' testimony is that clear that it can be done --

THE COURT: It was clear, you put it to him clearly and he answered it clearly; and his whole performance up here was clear. If we didn't restrain him, he'd be talking all night.

MR. KASSNER: That's true.

THE COURT: All right.

MR. KASSNER: That's true.

THE COURT: Let's go on.

He knew what your question was and he knew what you were looking for and he gave you the answer.

MR. KASSNER: But I don't think his answer was that clear as your Honor says.

THE COURT: It's clear that he says it was possible, and if it was possible, there is no issue.

BY MR. KASSNER:

Q Mr. Levin, at January 27, 1972, were all of the

films in the East Coast Cinematics workshop owned by East Coast Cinematics?

A There were probably films that belonged to us, and there were probably films that we treated for other people.

MR. LEVITT: Objection.

THE COURT: Overruled.

Q Did you ever hear of a film called "Superman"?

A Yes.

Q Did that film on January 27, 1972 belong to East Coast Cinematics?

A I don't know.

Q As to the work with the -- they started calling it the shellacking machine, so I will call it the shellacking machine -- as to the work of the shellacking machine, did you frequently shellac other people's eight millimeter film for them?

A Yes, we did.

Q Would Mr. Jones necessarily know who these people were?

A Not necessarily, no.

Q Do you know some of the people?

A Yes.

Q Would you tell the Court some of the names of the people for whom you shellacked films at that time?

A Charles Cine Equipment Company.

Q Anybody else?

A Couple of the bookstores, at that time I believe it was Model Distributors.

Q Were virtually all of the local peep show operators in the Times Square Area who had their own peep show machines dependent upon you for the coating process?

MR. LEVITT: Objection.

THE COURT: Sustained.

Are you telling me that only Charles Cine and a couple of bookstores were the only people in the Times Square area who owned their own machines? Are you telling me that Hodas owned all the machines in the Times Square area except one or two?

MR. KASSNER: That is the position of the Police Department.

THE COURT: I'm asking your position because that's what you're trying to tell me here.

MR. KASSNER: That's what I'm trying to tell your Honor?

You asked me not to testify. Now I don't know what you want.

THE COURT: Obviously in your questioning, you know what I'm talking about. Now your client said he did it for

everybody in the area. So far we have dragged out of two witnesses Charles Cine and a couple of bookstores like Model Distributors. And I'm asking, is that the whole area?

Jones knows that Sonny upstairs, the bookstore where you had your own machines, had them done; and the other one was 1605, Hodas' place, not somebody outside.

BY MR. KASSNER:

Q Mr. Levin, in places where you had machines, did you frequently lease out these machines to bookstore owners?

A Sometimes we did, yes.

Q They put in their own film?

A Yes, they did.

Q And consequently they processed the film -- they had it shellacked at your place even thought it was there own film?

A Usually, yes.

THE COURT: Who were they?

THE WITNESS: Model Distributors and 1605.

THE COURT: You have given me that and Charles Cine, and 1605, Jones says, was your place. Now who else have you got? I get the same three all the time.

THE WITNESS: At 1605 we had leased the equipment to the store. That was Model Distributors.

THE COURT: Who else?

THE WITNESS: We did some work for people in Philadelphia.

THE COURT: Philadelphia? That's not Times Square. Who else?

Next question, Mr. Kassner.

Q So there were a number of films on the premises that did not belong to East Coast Cinematics, Inc. at any given time during the January 27, 1972 period; is that correct?

A Yes.

Q When you got back to your offices at 113 West 42nd Street, did you find any of your records?

A None of the major records of the corporations. The account books and ledgers and checkbooks and corporate records, they were all gone.

Q Was it possible to operate a business at that time?

A No, they had also taken tax records too that were supposed to have been sent out that week.

Q Did you have any of the records that were required to run a business?

A No, not at that time.

Q They were all gone?

A Right.

Q How long did it take before you got them back?

THE COURT: What has that got to do with the motion here?

MR. KASSNER: Well, if your Honor please, it is our position that there was a massive seizure which invoked a Near versus Minnesota situation, was a violation of the first amendment; it was an unreasonable search and seizure, as suppressive matter under the doctrine of Roaden against Kentucky.

That is our position. I think that perhaps I did not do justice to it in my friefs and I will make an application to your Honor as soon as the testimony is over, because I think justice has to be done to it in view of what has transpired in this.

THE COURT: You have had this case for a long time. There will be no more briefs. I have a main brief from you, I have a supplemental brief from you. There will be no more briefs. This case will be disposed of within the next week.

MR. KASSNER: Your Honor, can we then have oral argument on the law?

THE COURT: No, I can read the law. I have two briefs from you. How many more briefs do you have to give me?

Finish with the witness. This case was supposed

to be finished in an hour-and-a-half yesterday. I have an awful lot of things to do upstairs that are more important than this.

MR. KASSNER: Your Honor, just what is more important than the freedom of two individuals, I don't know.

THE COURT: The freedom is that a lawyer should know that you should not take more than a day-and-a-half on a suppression hearing who has submitted one brief to me, then his supplemental brief, and now wants another brief to come in.

MR. KASSNER: Your Honor, the only reason I have done this is because of the manner in which this hearing has transpired, what has come out in this hearing, and what has become apparent as a result of this hearing.

THE COURT: You knew everything that came out of this hearing before you started it.

MR. KASSNER: No, your Honor, I didn't know.

THE COURT: You should have.

MR. KASSNER: Okay.

BY MR. KASSNER:

Q As to the door between the bookstore and the East Coast Cinematics, Inc. premises at 210 West 42nd Street, did you ever find that door unlocked?

A I never found it unlocked, no.

Q Did you give any instructions to the employees on the premises with regard to that door?

A That door was always supposed to be locked.

Q Where was most of the work of the employees of East Coast Cinematics in that premises conducted?

A The majority of the work was done in the basement.

Q Were there frequent times when employees were in the basement and no employees were on the first floor of those premises?

A Yes. There were times.

Q Could the public have walked right in through the bookstore and peep show area into your workshop if that door had not been locked at all times?

A They could have walked in if it was not locked.

Q And most of the time there was nobody upstairs in the workshop area so they could have taken whatever they desired; is that correct?

Q Yes.

Q On that door, was there imprinted any information, the door between the bookshop area and the workshop?

A The name of the company was printed on the door and also "Do not enter."

Q Was this printed on the door at all times since you have had that workshop?

A Yes, sir.

MR. KASSNER: I have no further questions.

THE COURT: Mr. Levitt.

CROSS-EXAMINATION

BY MR. LEVITT:

Q The corporate offices of East Coast were located at 113 East 42nd Street on January 27, is that correct?

A That's correct, sir.

Q How long had they been located on that premises?

A A very short time. We had just recently moved.

Q How short?

A Within the month.

Q Shorter than a month?

A Within that month, we moved in.

Q Could you be more specific in you time period?

A No, sir.

Q I show you Government Exhibit 7 for identification, and ask you to examine it, read it to yourself, and please state whether, based upon that, your recollection is refreshed.

A Refreshed as far as what?

Q As to the time that you moved into 113 West 42nd Street.

A It's just a letter with a date on it. That's when the letter was typed.

Q Who is that letter addressed to?

A U.S. Post Office.

Q Is it a change of address letter?

A Yes.

Q For East Coast?

THE COURT: Does that date refresh your recollection as to when you could have moved into 113?

THE WITNESS: No, it does not.

THE COURT: It does not refresh his recollection.

BY MR. LEVITT:

Q In January of 1972, am I correct that you stated your functions for East Coast were to make collections from the coin boxes and to oversee the shop operation?

A Yes, sir.

Q In January of 1972, approximately how many machines did East Coast have, that is, peep show machines, operating in the New York area?

A The figure varied. I'd say in the area of 150 to 200 machines.

Q How many were in the front portion of 210 West 42nd Street?

A At that time, I don't recall.

Q How many places did East Coast have its machines placed at?

A The figure varied quite frequently.

Q At that time?

A I don't know. I couldn't give you an exact answer.

THE COURT: Can you give an approximation?

THE WITNESS: Could be 20 to 30 locations.

BY MR. LEVITT:

Q How often were those machines emptied?

MR. KASSNER: Objection, your Honor. I don't understand the relevance of these question on a motion to suppress.

THE COURT: Sustained.

Q How much of your time was taken up in your duty in collecting from coin boxes versus overseeing the shop operation?

A It was a couple of hours a day.

Q What was?

A The collecting.

Q How much time was devoted each day to your duties in the office of East Coast and 113 West 42nd Street?

A Several hours a day.

Q Several hours a day. You worked the normal working day, nine to five?

A No, sir.

Q Longer, shorter?

A Longer, usually.

Q Longer usually, and what time of day would you normally come to the premises at 210 West 42nd Street?

A Normally I would be there quite early in the morning, about 7 o'clock or so.

Q Any employees there when you arrived?

A Any of my employees? No.

Q Who in fact leases 210 West 42nd Street?

A Who leases?

Q Who leased it in January of 1972?

THE COURT: You mean the entire premises?

MR. LEVITT: Yes, your Honor.

THE COURT: From the owner of the building?

MR. LEVITT: Yes, your Honor.

THE COURT: Do you know who?

THE WITNESS: At that time it was Island Amusement.

THE COURT: Was that one of Hodas' corporations?

THE WITNESS: Yes, sir.

BY MR. LEVITT:

Q It was not East Coast?

A No, sir.

Q Who was the person who would purchase the films on behalf of East Coast?

MR. KASSNER: Objection, your Honor.

THE COURT: Sustained.

Q Did East Coast, in fact, purchase its own films?

MR. KASSNER: Objection, your Honor.

THE COURT: Sustained.

BY MR. LEVITT:

Q Now, with regard to your testimony that you do some processing of film for some people in Philadelphia, whose machines are those in Philadelphia that you do the processing for?

MR. KASSNER: Objection, your Honor.

THE COURT: Overruled.

A At that time?

Q At that time.

Q We processed film for people that had some of their own equipment and we had some equipment in Philadelphia also.

Q Your machines, that's East Coast machines, is that what you are saying?

A Yes.

Q The film that you do the processing for that's not East Coast's film do you know how that film arrives at 210 West 42nd Street?

A During what time is this you're talking about?

A January of '72.

THE COURT: You mean the film that comes there for the purpose of being processed?

MR. LEVITT: Yes, your Honor.

A It's sometimes delivered. People drop it off; and they pick it up.

Q Did you testify before a grand jury in New York State in March of 1972?

A Yes.

Q And was this question asked of you and did you give this answer"

"Q Mr. Levin, the films that are actually shown at the peep shows, am I correct they only come from the office at over at 133 West 42nd Street? There is no other way that the people that operate the shop get the film?

"A We send the film down to the shop."

MR. KASSNER: That's complete irrelvant to the question.

THE COURT: I don't think that's inconsistent unless you show me they are talking about all their film.

MR. KASSNER: He's talking about --

THE COURT: I'm sustained your objection. What do you want to keep talking for?

BY MR. LEVITT:

Q What was the function of Mr. Jones in January of

1972 for East Coast?

A He was the shop foreman.

Q As foreman, what were his responsibilities?

A To oversee the work of the employees and make sure that the film was treated and the equipment was properly serviced, and the repairs were made as necessary.

Q So he oversaw the operations at 210 West 42nd Street?

A Of the shop, yes.

MR. LEVITT: No further questions.

THE COURT: All right, you may step down.

(Witness excused.)

THE COURT: Any other witnesses?

MR. KASSNER: No, your Honor.

MR. LEVITT: Your Honor, may I have a moment please?

THE COURT: Defendant rests?

MR. KASSNER: Yes, your Honor.

(Pause.)

MR. LEVITT: Your Honor, the only thing the government has to offer in rebuttal is a copy of the corporate papers for East Coast and as part of that, the papers indicating the date and change of name of East Coast to its present name, East Coast Cinematics, Inc.

Counsel has advised me that he will stipulate it

into evidence.

MR. KASSNER: No, I didn't. I said I would stipulated that it's authentic. I will object to it going into evidence on the ground that this charge of name took place before January 27, 1972.

THE COURT: What was the date? That's all I need.

MR. LEVITT: The date of name change, your Honor, is November 18, 1969.

THE COURT: All right.

I don't need that. I just need the date.

MR. LEVITT: Your Honor, the other function of it is that it lists the official name of East Coast before the name change as East Coast Cinerama Theater, Inc. not East Coast Cinerama, Inc.

MR. KASSNER: I will stipulate to that, your Honor.

THE COURT: Not necessary. Date of name change, November --

MR. LEVITT: 18, 1969, your Honor.

THE COURT: All right.

MR. LEVITT: In that case, the government also rests, your Honor.

THE COURT: All right. Decision reserved.

MR. KASSNER: May I make an application, your Honor?

THE COURT: Yes.

MR. KASSNEP: Your Honor mentioned yesterday plain-view. This is one of the things that made me believe that it might be extremely beneficial for me to do some work which I didn't consider doing and which I think should be done relating to the plain-view doctrine when expression presumptively protected by the first amendment, such as books or films as in the instant case, is involved, and when a gun is involved or heroin is involved, the doctrines are completely different.

It is not common to come across a situation where judges are very, very familiar with first amendment implications of certain material, whereas they are completely familiar and well acquainted and daily acquainted with the fourth amendment implications.

Since Roaden versus Kentucky, the Supreme Court of the United States has clearly held that what is an unreasonable search --

THE COURT: I gather Roaden against Kentucky is cited either in your main brief or your supplemental brief?

MR. KASSNER: Yes, your Honor, I'm not arguing the case. What I'm saying is that the doctrine of plain-view is completely different as to first amendment material than is it as to other materials which your Honor would normally think is contraband. Therefore, I think that it would be

appropriate if I got the record and wrote a --

THE COURT: This decision is coming down in the next week. I don't need all that time. You have had plenty of time for this, you told me you wanted a suppression hearing over a month ago. You have submitted a main brief and a supplemental brief. There's got to be an end sometime.

MR. KASSNER: I didn't know what testimony would go in and I didn't know what comment your Honor would make. I didn't understand --

THE COURT: Don't worry about my comments. You producted two briefs. That's enough. You have in it two briefs giving your client the benefit of everything he should have there is something wrong.

MR. KASSNER: I am not doing this for me.

THE COURT: Don't worry about me. You present your clients' position as you think it should be presented; that's your job.

MR. KASSNER: That's the application I just made now, to get the minutes.

THE COURT: Obviously at this late date the answer has to be no, because we can't be dragging it on and dragging it out. I hope to try this case in June.

MR. KASSNER: Well, your Honor, I don't think that this case should be tried. That's why I'm making my application

right now.

THE COURT: And that's why you will have a decision within the next week.

MR. KASSNER: Yes, your Honor.

* * * * * * * *

(Portions of Testimony Omitted)

A Yes.

Q Were you married at that time?

A Yes, I was married. I got married about, I think, somewhere in about 1955 or '6.

Q Did you finish college?

A No.

Q Why not?

A Well, I had a little baby daughter and I was getting a subsidy from under the G.I. Bill, but it seemed at that time it just wasn't enough. My wife had worked up until the time we had our first child. After she had the child, I had to go into business, and I had to give up school.

Q That was the vending machine business?

A Yes.

Q Would you describe the nature of your business from that date until 1968?

A Well, it was all types of vending machines. I started off with some coffee machines, soda machines, just a few of those, and then I put out penny machines, they were like target practice pennies, you had to hit a target, little kickers and catches, you kick up a ball and you had to catch it. After I was in that for a year or so and made a few dollars I bought a couple of juke boxes and

I started putting out juke boxes in little luncheonettes and then I started putting out games and pool tables and I guess I was in that business for about 12 years or so up until I started in 1955, '56, and I had a route of games, juke boxes, pool tables, and in 1968.

Q These are all coin operated devices?

A All coin operated machines, that became my life, coin operated machines.

Q Now, how would you run this business? What was the nature of this business?

A Well, it was a one-man business. I was the only one that ran it. I made collections. By the way, also during this time I owned a couple of bars also at the same time, I think for a couple of years. I think about, say, 1963 or '64 I had a couple of bars that I worked them also, I tended bar there after I got done with my route.

It was just a matter of servicing the equipment, keeping it running, changing the records on the juke boxes, supplying the pool tables, making sure they had the sticks and chalk and everything, and repairing the machines and collecting the money, splitting it with the store owners.

Q Did there come a time in 1968 or 1967 when the nature of your business took on a different turn?

A Yes.

Q Would you tell the jury when?

A Well, I had seen in my travels, I had seen at one time a coin operated movie device. Now, all the juke boxes and game companies were down on 10th Avenue and 42nd Street in New York, so I used to travel in quite often from the Island where I always lived, and I always used to go down 42nd Street, and always was very fascinating, the first time you go down there, there was just so many people, and so many lights and so many things, and the thought had occurred to me that with so many people walking in one area, that it would be a good idea to put in these coin operated movie machines in any type of store at all that I could. I went ahead and I canvassed the neighborhood and I finally got one fellow in a book store that allowed me to put in a couple of coin operated movie machines.

Q Then what happened?

A Well, I put in a couple of machines there. In fact -- and there was a fellow over in New Jersey, I found out that that is where I bought these machines from, he had 13 machines, that were about 30 years old, very big relics like, but these were the only machines at all that I knew about in the entire country, so I went over to see him. His name was Phil Gould. He was over on Market Street in Newark. And I believe I borrowed $7,000 from also again from

Bankers Trust Company, and I bought these 13 machines from him, and I put these 13 machines out in bookstores on 42nd Street.

Before I put any of them in I always made sure I had contracts and I also got permission from the New York City Licensing Department to put these out. I went to see them to find out if they would be legal, and they gave me a letter to the effect that these machines required no licenses and they were absolutely legal.

I proceeded to put out these 13 machines and they were doing quite well. And everybody was -- the other fellows in the bookstores would come up to me and all ask me to put machines in their places. At that time I spread them around. I would have maybe just one machine in one store, one in another, maybe five or six stores where I had all the 13 machines distributed.

Q Mr. Hodas, was that business inherently any different than the way it ran -- than the way you ran your other coin operated devices?

A No, also you put a quarter in the machine instead of a juke box. Instead of hearing music, you saw a picture.

Q And the split was the same?

A The split was the same, with practically all the

stores. And I --

Q What happened after these film machines started catching on, Mr. Hodas?

A Well, I went down to a fellow by the name of Mike Mulvey who was a big arcade man to find out where I could buy more machines because I was being asked for more machines, and he had also a couple of other old relics, and they came from a company, and he told me where they came from --

Q Do you want some water?

A No, that is fine.

Yes, I woud like some water, please, if that is possible.

MR. LEVITT: Your Honor, may counsel approach the bench.

THE COURT: Yes.

(At th- side bar.)

MR.LEVITT: Your Honor, the government is not sure where all this question of whether he thought he was doing something legal as to putting out the machines or who he spoke to, if there is anything of relevance to deal with this case. Preliminary badkground was asked in the first five or six questions, as to who he spoke to and how he started in the company. Anything hereafter would be immaterial to the charge.

THE COURT: If he wants to put it in, he can. You can cross examine him on it.

MR. LEVITT: Yes, your Honor. I think if defense counsel is attempting to elicit all this in order to build up his credibility.

THE COURT: He may be opening the door to your cross examination.

MR. LEVITT: Yes, your Honor.

(In open court.)

Q Would you go on, Mr. Hodas?

A Yes.

Yes, well, I proceeded to put out more machines and I nad a -- in one of the first stores where I had I think three or four machines in, at 239 West 42nd Street, I had a little room in the back of the store which I asked the proprietor if I could use as an office at thattime, because it came to a point at the beginning all I was doing, I still had my juke boxes at the very beginning of 1968 -- my juke boxes and game route. When this business started to prosper I sold my entire vending business, I would say also at that time I hired the first people that ever worked for me in all my years of business, which was Herb Levin, I got him through an ad in the paper, another fellow by the name of Tim Jones, I got him from the -- from some kind of

state labor board. And then we had a little office where we repaired the projectors in the back of 239 West 42nd Street. Timmy -- Timmy and I used to go in the back and take care of -- it was like a little office -- take care of my regular business and Tim Jones set up like a little shop back there where he repaired projectors and sort of treated the film.

And then what ha-pened was that after I would say some time -- I believe somewhere in about March of 1968, that was my first experience of this type where a couple of fellows came into the back room one day, where me and Tim were and sort of sat down and start asking me certain, like, questions that I was not familiar with, like, who are you with? I didn't really know how to answer it. I didn't know what they meant when they said who are you with? With myself, I guess. Then they start saying, you don't understand, you have got to be with somebody. You can't be here alone. You can't be here on this street in this area doing what you are doing. I just told them, you know, at the beginning, like the first couple of times they came, they talked and they weren't too bad, they just explained to me I got to be with somebody, I really didn't know who I had to be with.

Then there came a time when a fellow by the name of Benny Glass came in with a couple of younger fellows

and he said that, I heard there is a lot of pressure being put on you.

There was also other events that happenedin the meanwhile. While I was out on my rounds in the stores I was also approched by people that were in the stores, certain stores I went to, they would grab hold of me and take me in the back room and also basically it was like the same -- the same thing they gave me, Marty, who are you with? And --

Q And whathappened with Benny Glass?

A Well, Benny Glass came in to me and says, "Marty, I hear you are under a lot of pressure."

Now, I didn't know Benny Glass. Benny Glass had about four stores. I had my -- some of my first machines in Benny Glass' stores. I had met him on one or two occasions. Most of the time I saw fellows that were working for him, his managers. And he came down, this one time, with a couple of, like I say, young fellows, and he told me that, "I heard that's a lot of pressure being put on you."

Along about that time I had, I believe, machines in quite a few stores. There was one store I had machines in, I think it was about maybe 8 or 10, just small machines, small counter models that were all busted up. One day they were broken up, completely destroyed.

In fact, at a later date, it would have been, I mean, came in and questioned me about that but that was a little later.

Meanwhile Benny Glass came in, he said ,"Marty, these things are happening, there is a lot of trouble, you have got to be with somebody."

And I sort of just at that time, I sort of understood by asking a lot of people that I came in contact with on the street, what the -- what they meant, you know, you got to be with somebody. And I learned what it meant. I was sort of -- I just didn't feel at that time that I wanted to be with anybody.

Q So you refused?

A Yes, I refused. I had worked all my life for myself.

THE COURT: Refused what?

THE WITNESS: I refused to make a deal. He told me that I had to be with him.

THE COURT: Who said that?

THE WITNESS: Benny Glass. Benny Glass told me that the only way that I could survive in this business is if I sort of, you could say, in a way, took him in with me. In other words, he became my man. And I --

Q Did you subsequently become associated with

Benny Glass?

A Well, after a couple of --

Q Just answer yes or no.

A Yes, I did.

Q What caused you to make this association?

A Well, there came a time it was about a couple of months later, Benny was seeing me sort of a little regularly, you could say. He waited for me to make collections in the store. In those days, before Timmy or Herb Levin started collecting for me, they were still mechanics like. He used to get me in the back of the store and sort of badger me. Anyway I got an office at 233 West 42nd Street. It was just like a one room office at the back of a studio. There were two desks, just a desk for Herb Levin and me. And one day I received a phone call and the phone call, the caller had said,"Marty," they said, "where is your son?"

Well, I told him -- I got to stop for a minute.

Q Do you want some water?

MR. KASSNER: May we have a short adjournment, your Honor?

THE WITNESS: No, that is all right. I will be all right in a minute.

They said to me,"Marty, where is your son?"

THE COURT: We will have a short adjournment.

The jury may retire to the jury room.

(Jury left the courtroom.)

(Recess.)

(Jury present.)

THE COURT: Go ahead.

A I received this telephone call. They said, "Marty, where is your son?"

I said, "I don't understand, what do you mean?" Something like that.

He said, "Marty, where is your son. We are asking you where is your son" and he hung up.

Immediately I was, I could say, a little excited, I didn't know what they were talking about, basically. I called up my wife and I asked her, right away, I got her home and said, "Where is Jarrett?"

I believe he was at that time going to nursery school or something. She says, "Well, he is not home yet. I don't understand, he should be home or he had come home or was playing."

I was like -- she looked around for him. And she called me right back and says says, "I don't know. Why do you ask?"

And I said, "You know, nothing. I got a present for him."

I didn't want to get my wife upset. I immediately walked right out of the office, I just says I got to go home, you know, this might be something wrong.

Oh, when I got home, my son was home. It was about a little over an hour later. My son was home and my wife said she wanted to know what's going on, my son had a letter with him. It was a letter, and in the letter it said -- he was only about, I guess about five years old or so, four or five years old, and in the letter it say, "Hi, Marty. Just to let you know that we are thinking very seriously about you."

That's all it said. I asked my son where he got the letter. He said some nice men took him for a ride in the car and bought him some ice cream and candy, and they said, "Give this letter to your father when you get home." They drove him back up the block and they let him out and they went.

Q What happened after that?

A Well, about two days later, Benny Glass came up to my office. He was also with somebody. Sometimes it was the same guy, sometimes it was somebody else.

And he said,"You don't seem to understand what is going on. He said,"This is no game. He said, "You're not with your -- you know, your little penny machines any more."

Because I had discussed my past business with him.

He said, "You don't understand, Marty."

He said very serious trouble could happen here. He said, "I hope you know what I mean now."

I said, "Look --" he was very adamant. But also to be very truthful with you, I was frightened. And then he just says, "By the way," he says,"how is that little boy of yours"? He says, "I hear you really dig him," you know, and in other words, he more or less let me know that -- what was going on. Then he sat down and he says, Okay, Marty, this is it. You are either going to be in this business or you are not going to be in this business. I am going to be with you or I am not going to be with you. If I am not with you I can't guarantee the health of any of your children or you." And there were arguments before that, I didn't actually go into actual physical pushing everything before this actually happened, before I got this phone call, they came up there, there was a couple of actual fights you could say in a way. And he says, "Either you -- that's it."

I told him I'd let him know what I was going to do to give him a day or two to think it over.

I went home and I guess discussed it with my wife. I was at that time -- I was making more money than

I had ever made before. And I guess I thought I figured I had no choice. He sort of just laid the law down to me. I felt it was the safety of my family, my business, I went ahead and I guess you could say let myself be extorted by Benny Glass.

Q How much money did you start paying?

A Well, another thing, you know, at the beginning, one of the things was, naturally how much he wanted, at the beginning. He says,"Well, I don't want much, you know what I mean. I know you are doing well, start giving me a thousand dollars a week."

Naturally, at the beginning, you know you protest, whatever he would have asked for, I would have protested and he explained to me, "Hey look, I got four stores myself anyway, I throw you out of the four stores, man, like I am being nice to you."

He made it sound like, you know, a little -- what can I do? If he asks me for more I would have had to give him that too. I had no choice. I thought he was sortof being a little nice. But as things progressed, and as I had put out more machines and everything, he just kept on eating me up. The more the business made, the more he took, and he knew how much the business was making because he knew everybody on the street, he knew all the stores, he was

around for like, I hear, 15 years. He knew what his stores were doing. It got to a point where it went as $5,000 a week during 1968.

Q You were paying him sums which started at $1,000 a week and went up to $5,000 a week in 1968 and in January and February of 1969, is that correct?

A Yes.

Q Do you know how much money you paid him from the time you started to February 28, 1969?

A I could give an approximation. I did have a book.

Q What happened to the book?

A Well, I had a little pad and I kept down the payment of every single payment that I had given to Benny Glass, and I kept that book in my drawer. There came a time in 1972, January of 1972, where the New York City Police Department had broken into my office, and they took out every single scrap of paper in that office, bar none. Every single book, record, check books, personal and otherwise. And then pursuant to a federal court order they were asked to return it all, and Herb Levin went down to pick it up, it was supposed to be returned like I think on a Thursday afternoon, and everything was just like in cartons, just thrown into cartons, which they had given us a sheet of supposedly what

they said they had taken but they didn't return it then, they said they were using it, they wanted to keep it a few more days, for the audit, and so Herb went back I think the following Monday, and he just -- they just had the cartons laying out there. And then we took all the cartons back to the offices and we tried to reassemble our business again. But there were many, many things missing. There were a lot of my personal mail was missing that I kept in there, correspondence. There was other personal records missing of the business, and of mine, and also there was this book that was missing that had the exact payments that I had given to Benny Glass. But I would -- I would say that from the period of 1968 of I think I started in with him I think in March or April of 1968 through to the end of February of 1969, it was in the vicinity of $175,000.

Q So you kept your records of the money you paid to Benny Glass?

A Yes, I did. I kept them along with the other records that they were talking about in the court.

Q Where did you keep all these records?

A Right in my desk. They were right there in my blotter drawer and there was a folder and all my records were there were they were supposed to be.

Q All the records of your business were kept in that

one room business, were they not?

A Yes, all the records of my business were kept there.

Q If you subtract the amount of money that you paid Benny Glass from the amount of money that were revealed in your daily books, collection books, the amount you reported on your income tax return was accurate, was it not?

A Yes.

THE COURT: Would you repeat the question?

Q If you subtract the amount of money you gave to Benny Glass from the amount of receipts, less expenses, which are shown on your daily books, Government's Exhibits 4 and 5, then the amount you reported on your income tax return for 1968 is correct, is it not?

A Yes, absolutely.

Q Now, yougave your accountant figures from time to time relative to cash receipts, right?

A Yes.

Q And these figures were the daily receipts less the daily cash expenses, less the money you paid to Benny Glass, is that correct?

A That is right.

Q And those numbers you gave to your accountant were accurate, were they not?

A Absolutely.

Q And the return is accurate, is it not?

A Yes.

Q Now, how do you arrive through your recollection at the $175,000 number throughout 1968 and up to February 28, 1969?

A I started -- like I say from when it started to when it ended, and the money I had given him, and when I had to prepare my tax forms, it just had to jell and that's the way it jelled. I figured that is what I had computed, that is the money I had given him.

Q That is more than the money the government claims is additional cash receipts. How do you explain that it is more than that?

A Well, it is probably two different reasons. I believe No. 1, I don't know how the government computed completely, like I believe when the men were up here on the stand, they said that this is what they figured and they did this and they did that. So they don't really know the actual,you know -- they couldn't completely decipher those records, but another thing is that I had -- I started paying Benny Glass before those records -- before they started with their records. I was paying Benny Glass, I believe, in March or April of 1968. I believe they started computing their records in August of 1968. So I had given Benny Glass

certain sums of money already by that time.

Q Did there come a time in 1968 or 1969 when you had a dispute with Benny Glass?

A Well, yes. My intentions were not to pay him forever. He was like the boss and I was like a worker. He was making much, much more than me, and I guess you always play for time, you know, and when you are either being blackmailed or extorted or anything. Finally came the time, I thought I had like maybe a little rapport with him, but they turn on you like a snake.

I opened up with a store at 1115 6th Avenue, and Benny wanted more and I wanted to give him less, because I said it is about time I started -- you know, I was working very, very hard, I wasn't going home lots of nights, it was the beginning of a business, we were building a new business, and he just came in and collected his money, and at that time also, I guess you are a little more -- you have a little more fear in you when you are being threatened, other people that were on your back, and after months elapse and everything, you start feeling, you know, the fear leaves you, you start getting a little aloof again, so I started cutting him down. I started cutting him in half and tried to make deals with him, you take your stores and everything, and just leave me be. We had

meetings that effect and he just stood pat. And finally, I says, "That's it, Benny, you know what I mean."

Every once in a while I sort of would insinuate that I am going to people, you know, going to the authorities, something like that. And there wer some very, very violent arguments, so I guess he taught me my second lesson.

One day in this new store at 1115 a fire bomb was thrown through the front window. A Molotov cocktail was thrown thorugh the front window and it did quite a bit of damage and everything.

Q After that, did Benny Glass have any trouble with you?

A Well, no. No, he just told me, "Look," he said, "that is one store. I will bomb every store you have."

Q Now, did you declare the moneys that were delivered to Benny Glass on your tax return, specifically?

A No.

Q Why didn't you?

A Why didn't I declare it? Well, No. 1, if I declared the money that I was giving to Benny Glass I would nave had to give the government more money I was making. That is No. 1.

No. 2, for the same reason I gave Benny Glass any money in the first place, I guess I didn't tell anybody

about it. I guess I was just afraid. I always has the thought of my -- of the incident that happened with my son, and I knew that it could be repeated. These were sort of like bad people.

Q Now, how did you get to get the money to pay Benny Glass and when did you pay him and how did you pay him?

A Well -- various different ways. He really wasn't that concerned with where he got the money. Herb Levin used to give me the record sheets of when collections were made, and if you look at the bottom of those record sheets you see that there is a figure on the bottom of every record sheet.

Q You are talking about the Government Exhibit 4?

A Government's Exhibit 4. Well, I used to just take out -- I knew Benny had to get X amount of dollars, and I just used to go ahead and take out every day that was collected that X amount of dollars, I used to go down to the bank and get large bills for it, and hold it until Benny Glass came around for it. He either used to come up to the office or used to -- he'g vie me a call usually, he was usually coming to the office -- I said drop it off.

He said drop it off at his store, see him at his store, lots of times he made me wait until 11, 12 o'clock

* * * * * * * *

(Testimony Omitted)

MEjw 1 Hodas - cross

BY MR. LEVITT:

Q Now, you stated that the figures you gave to your accountant were the cash receipts, less the business expenses, less the payments to Glass, correct?

A Yes.

Q And you stated that you have two reasons why you did not tell your accountant about Mr. Glass:

First, Mr. Glass is bad people, and second, if it was on the tax return, you'd have to pay more money to the government which you didn't have.

A Yes.

Q Now, by your tax return, yours personally or East Coast's?

A I imagine East Coast.

Q In other words, you knew that your payments to Mr. Glass were not deductions for the business; is that what you stated?

MR. KASSNER: Objection, your Honor. I don't understand what that means. How does he imply that from that statement?

THE COURT: Because the witness made the statement he had to pay more money.

MR. KASSNER: The witness doesn't have the vaguest idea what his tax implications are.

THE COURT: Not from his answer to your question, Mr. Kassner. He had no trouble in answering your question.

A Well, excuse me, would you please repeat that question.

Q You told your accountants you would have to pay more money if they were reported on the tax return and you would have to pay more money to the government than you had.

A Yes.

Q So you are stating you knew that you couldn't deduct these?

A I thought that they were deductions.

Q Then why would you have to pay more money to the government?

A Why would I have to make more deductions?

Q No, pay more money to the government.

A This was something that I was very frightened about. In other words, the same -- I didn't tell anybody about this for the same reason why I paid Benny Glass money in the first place, I didn't tell anybody about these payments which were being made.

Q Mr. Hodas, excuse me.

THE COURT: Wait. Wait. Wait.

You told your counsel in response to his

question to you that the first reason you gave your counsel why you didn't report the payments to Glass is because it would mean that you would have to give the government more than you would have to.

The question from the Assistant is, how do you figure that out?

THE WITNESS: Well, the actual answer -- in other words, I figured that this was a deduction from my business. I figured that Benny Glass got this money and what was left over was the fair amount of money that I should report to the -- to the --

THE COURT: That isn't the question. The question is, you said that if you had reported the payments to Glass, you would have had to pay a greater tax.

THE WITNESS: If I reported the payments to Glass? No, no, no. Then either I don't understand you or I am being confused now.

What I meant to say then was that if I had -- if I understand now, in other words, what I meant to say, I was a bit confused, was that if I went ahead and reported the full income without taking off the payments to Benny Glass, then I just couldn't survive.

In other words, I had to take the money off that I gave to Benny Glass from the receipts of the business

and just report what was left over.

In other words, to qualify my answer, if there was nine --

THE COURT: You mean you are changing your answer now. You are not qualifying it.

THE WITNESS: Well, I was a little confused in the answer before. That's what I meant to say.

THE COURT: Go ahead, Mr. Levitt.

* * * * * * * * *

(Testimony Omitted)

would not be a legitimate inquiry from the character witness: Would it change your opinion?

THE COURT: I wouldn't allow the question to be put.

MR. LEVITT: Your Honor, if the Court can't rule at this time with regard to the remaining witnesses which I understand will be character witnesses and Levin on behalf of Mr. Levin, two witnesses I do not know, as to whether or not the Court will reverse its ruling as to describing the nature of the machines or using the words pornography or peep.

THE COURT: Mr. Levitt, my ruling in response to Mr. Kassner's -- strike that.

My ruling on Mr. Kassner's request that you not use peep show was in relation to your direct examination on the basis that it had nothing to do with income tax evasion. That ruling does not apply when his client takes the stand. You can't be shackled and let him ask a client all the questions he wishes. When you objected to his asking such questions which you seemed to have been prevented from going into on the government's case, I overruled your objection and I said to you he was opening the day to cross examination.

MR. LEVITT: Yes, your Honor, I understand.

MR. KASSNER: I don't quite understand what I asked on direct examination which would raise --

THE COURT: How you bought 12 lousy old machines from a second hand dealer and made $175,000 out of it. Are they made of gold? What made them worth $175,000?

MR. KASSNER: He didn't make it with the 12 machines.

THE COURT: He put them in the first year.

MR. KASSNER: Yes,but he didn't make it with only 12 machines. The firstyear he had over a hundred machines.

THE COURT:It is not in the record. No. 1.

No. 2, he has a perfect right to ask him, well, how do these operate that you made so much money? $25 a minute? Well, what do you see for a minute? What is the nature of the film? You opened that door for him completely.

MR. KASSNER: Is there any dispute as to how much money was grossed in this case?

THE COURT: You put into the record a description of this man's business and he now has a right to let the jury know what that business was. And I so ruled yesterday, but he didn't take advantage of it. If he still can do it with Levin, he can. That is open to the jury

now, wide open. He was never bound on the whole case. How can I shackle him on how he can cross examine your witnesses, your defense. I shackled him on the government's case on the theory that you might rest at the end of the government's case and therefore you shouldn't be prejudiced by the fact that your client may or may not have been involved in showing pornographic film but when you put your man on the stand all bets are off. You can't go ahead and tell the D.A. now I got you in the corner, I can ask all the questions I want, you can't cross examine on this.

MR. KASSNER: If your Honor please, I don't see how it is an issue in the case as to what the subject matter of the film was.

THE COURT: It is already out. You used peep show yesterday, the court reporter says. Your client says he showed them all over Times Square in book stores. It doesn't take long for the jury to go from that step to pornographic film.

MR. KASSNER: What relevance --

THE COURT: I have ruled, Mr. Kassner. You opened the door to proper cross examination by the government. And that ruling I made was only on the government's case, in case you were resting on the government's case

and you went to the jury on that basis, you wouldn't be prejudiced by it, and that was the basis of that ruling, and there was a darn fair ruling, I think.

MR.KASSNER: And it still would be.

THE COURT: Not when you put your client on the stand to go flying off into the wide blue yonder, I don't shackle the Assistant U.S. Attorney in that manner.

MR. BENARD: Now, your Honor, is the Court ruling that such questions may be put to Mr. Levin?

THE COURT: Absolutely.

MR. BENARD: Suppose I don't go into it, then isn't the questioner bound by the direct examination?

THE COURT: No.

MR. BENARD: All right,then in view of that --

THE COURT: I don't see how you can possibly put Levin on the stand and not get out that he was dealing with coin operated film machine,and ask him to describe what they were like.

MR. BENARD: I don't intend to ask him that.

THE COURT: You don't, but he can. I am going to let him.

MR. BENARD: All right, that is your -- you are the judge.

Now then, in light of that, I certainly don't think

that the word "pornography" should be used because that's a term of art and pornography is only such when --

THE COURT: You can ask him to describe the pictures. Were you shown -- what is the name you used? Temple? Was he showing Shirley Temple pictures?

MR. BENARD: The truth of the matter is that all of these films were not sexually oriented.

THE COURT: Nobody said all of them were.

MR. BENARD: That's a fact.

THE COURT: Isn't it something for the jury to consider since you put all this into the record already how do you make all that dough by some old machines? What have they got? What is to them that can make 175 grand in the course of one year?

MR. KASSNER: We are not disputing the gross.

THE COURT: That isn't the point. You put your man on the stand to describe his business. The government has a right to let the jury know what the business was. You kept on going after I ruled. I thought you were going to stop.

MR. KASSNER: The jury knows what the business is.

MR. BENARD: I can see my client prejudiced by that.

THE COURT: Too late.

MR. BENARD: That is the problem of a joint trial. I realize that. What about this business -- your Honor's ruling is that he can ask him the nature of the films?

THE COURT: Right.

MR. BENARD: And then let Mr. Levin give what he thinks is an appropriate answer?

THE COURT: Sure, as long as it is truthful.

MR. BENARD: I don't intend to coach him. Levin is not a stupid man, you know. All right, if that's the Court's ruling, then so be it.

THE COURT: That's the Court's ruling.

MR. BENARD: I object.

THE COURT: Okay, let's go.

(In open court.)

(Jury present.)

THE COURT: You may proceed.

I gather that Mr. Kassner has rested?

MR. KASSNER: No, your Honor.

THE COURT: Do you have another witness?

MR. KASSNER: Two more witnesses.

THE COURT: Put them on.

* * * * * * * *

(Testimony Omitted)

A No, sir. At the time, between myself and Herb's arrival, I used to help Marty, but I never collected until Herb came in.

Q I couldn't hear that last statedment, sir.

A I did not collect -- when I start. After Herb came in and his wife was sick and he had to be at the hospital.

Q Was that in --

A Yes, it was in '68. Yes, '68.

Q And so, for that brief time you collected from the machines, is that correct?

A I helped Marty collect when I started before Herb came in.

Q Oh, Mr. Herb came in?

A I helped Marty.

Q Now, these machines that you put the film in, are these films known by a common name?

MR. KASSNER: Objection, your Honor.

THE COURT: Overruled.

Q What are these films normally called, sir -- these machines, sir?

A Peep show machines.

Q And the films in them, what do they usually depict?

MR. KASSNER: Objection, your Honor.

THE COURT: Overruled.

A Well, boy-girl movie.

Q I am sorry?

A Boy-girl movies.

Q In the time you were collecting, when you opened the machine to take out the money, the quarters, were there a lot of quarters?

A Sometimes there were. Sometimes there weren't.

Q Do you know what arrangements, if any, Mr. Hodas had, on behalf of East Coast, with Mr. Glass, concerning the proceeds from these machines?

A Well, like most stores we collected in --

Q No, with Mr. Glass, do youknow the arrangmeents with Mr. Glass?

A 50-50.

MR. LEVITT: No further questions.

THE COURT: Mr. Benard?

MR. BENARD: I have no questions.

THE COURT: Do you have any redirect?

MR. KASSNER: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. KASSNER:

Q Mr. Jones, on the stores in which Benny Glass

* * * * * * * *

(Testimony Omitted)

UNITED STATES OF AMERICA

vs. 75 Cr. 295

MARTIN J. HODAS and
HERBERT J. LEVIN

July 24, 1975
10:00 A.M.

Trial Resumed

CHARGE OF THE COURT

Judge Metzner

THE COURT: Madam Forelady, ladies and gentlemen of the jury:

We have now reached the point in this trial when you are about to enter upon your final function as jurors, which is, of course, one of the sacred duties of citizenship. You have given careful attention to the evidence during the course of the trial, and I am certain that you will conduct your deliberations in the same fine spirit that you have so far displayed and with impartiality and fairness reach a just verdict in this case.

In our court system the functions of the judge and the functions of the jury are clearly defined. It is my duty to instruct you as to what the law is; it is your

duty to accept the law as I charge it to you.

Just as I am the exclusive judge of the law, so you are the exclusive judges of the facts. You alone determine the credibility of the witnesses, and the weight, effect and value that should be given to their testimony. It is up to you to determine from the evidence you have heard what the facts are in this case, and from those facts decide whether a defendant has violated the law.

This is a criminal prosecution in which the government is one party and the defendants are the other. The fact that the government is a party entitles it to no greater and to no lesser consideration than any other party. It is entitled to the same consideration as given to the defendants, no more and no less.

This case must be decided within the scope of the charges against each defendant as contained in the indictment, but before discussing the law applicable to the charges of the indictment, let us consider some general principles which apply to every criminal case.

An indictment itself is not evidence. It merely describes the charges made against a defendant and may not be considered by you as evidence of the guilt of a defendant.

Nor can the fact that a grand jury has found

this indictment in any way detract from the presumption of innocence with which the law surrounds a defendant unless and until his guilt is proved beyond a reasonable doubt.

Each of the three counts in this indictment which you will consider alleges the commission of a separate and distinct offense. It will be necessary for you to reach a verdict of guilty or not guilty as to each of the defendants separately on each of the counts of the indictment in which he is charged.

You must consider and weigh the evidence separately as to each defendant in each count. The fact that you may find one of the defendants guilty or not guilty of one of the offenses charged should not control or influence your verdict with respect to any other offense of which he is charged, or to a charge against the other defendant.

As a result of my rulings on motions which involve matters of law and do not concern you, the charge contained in the third count that the defendant Levin violated the law which makes it a crime for any person to sign an income tax return which he does not believe to be true and correct as to every material matter, has been withdrawn from your consideration.

This disposition should not be considered or

and common sense which arises after a consideration of all the evidence.

Reasonable doubt is a doubt which would cause reasonable persons to hesitate to act in matters of importance to themselves. It is not a vague, speculative, imaginary something, and a person may not be convicted on mere suspicion or conjecture.

On the other hand, a reasonable doubt does not exist merely because a juror does not wish to perform an unpleasant duty.

A reasonable doubt may arise not only from the evidence produced, but also from a lack of evidence. A defendant may also rely upon evidence brought out on cross-examination of any of the witnesses who have testified on behalf of the government.

Now, it is not necessary for the government to prove the guilt of a defendant beyond any possible doubt. Proof is usually not a matter of mathematical or absolute certainty. In the nature of things it cannot be; but to sustain a conviction there must be such proof as satisfies your reason as intelligent people, beyond any reasonable doubt, that the defendant is guilty as charged.

If you do not have a reasonable doubt of a defendants's guilt as to the material elements of a charge, then you should return a verdict of guilty on that count.

If, on the other hand, you do have a reasonable doubt as to a defendant's guilt as to any of the material

discussed by you, or influence you in any way in passing upon the guilt or innocence of the defendant Levin on either of the two counts against him which I am submitting for your consideration.

Each defendant has denied the charges in the indictment. By his plea of not guilty, each defendant has put into issue every material fact alleged in the accusations brought against him.

Accordingly the government, having made the charge, has the burden of proving beyond a reasonable doubt each material element of each count of the indictment.

This rule applies to each defendant individually as to each of the charges in the indictment. This burden of proof never shifts. It remains with the government throughout the entire trial and during your deliberations as jurors.

A defendant does not have to prove his innocence. He is presumed to be innocent, and this presumption is overcome only when you reach a conclusion from the evidence that his guilt has been established beyond a reasonable doubt.

Now, what is meant by a reasonable doubt? There is nothing mysterious about the term. It means, as the words themselves indicate, a doubt based upon reason

elements of the crime charged, then you must return a verdict of not guilty as to that count.

This trial has been a short one and only yesterday afternoon you heard the summations of counsel, in which they pointed out the various portions of the proof on which they say you should rely to render a verdict in favor of their client.

I see no reason to further detail the contentions of the parties or the specific proof to substantiate those contentions.

You will be considering three counts -- a conspiracy count and two substantive counts. Substantive counts and conspiracy counts are governed by different legal principles.

Generally speaking, a substantive count charges a violation of law which condemns specific conduct as illegal, for example, attempting to evade income taxes, or filing a false return.

On the other hand, in a conspiracy count the offense charged is an agreement or understanding of two or more persons to commit a violation of a particular substantive law.

Count One of the indictment is the conspiracy count. It charges that from on or about August 12, 1968 and

up to and including May 14, 1969, Martin J. Hodas and Herbert J. Levin unlawfully, willfully and knowingly conspired to defraud the United States by impeding and obstructing the governmental functions of the Internal Revenue Service in ascertaining, computing and collecting revenue, to wit, income taxes due from East Coast Cinerama Theatre, Inc., and conspired to evade income taxes in violation of Section 7201 of the United States Code.

Now, what is a conspiracy? It is a combination or agreement of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, and one or more of the persons who are members of the conspiracy does any act to effect or further the object of the conspiracy.

It is a partnership in criminal purpose in which each member becomes the agent of every other member. and is a crime in itself.

To prove a conspiracy here, the evidence must show, beyond a reasonable doubt the existence of each one of the following elements:

First: That the conspiracy described was formed and existing at or about the time alleged;

Second: That it was part of the conspiracy to do either one of the following:

To maintain two separate sets of books and

records, one set to be used by the defendants' accountants for the purpose of computing corporate income tax owing, and a second, secret set containing the true and accurate income of East Coast Cinerama Theatre, Inc., and further, as part of the conspiracy, that the defendants would present false and fraudulent books and records showing understated income to their accountants for the purpose of transmitting that false and fraudulent information to the Internal Revenue Service on the corporate tax return of East Coast Cinerama Theatre, Inc. for the fiscal year ended February 28, 1969.

The third element that you must find beyond a reasonable doubt is that the defendant knowingly and wilfully became a member of the conspiracy;

Fourth: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment, at or about the time and place alleged; and

Fifth: That such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

The word "false" as used in the indictment means that the claim was untrue when made, and was then known to be untrue by the person making it or causing it

to be made.

The word "fraudulent" as used in the indictment means that the claim was falsely made or caused to be made for the purpose and with the intent to deceive.

You may find that a defendant acted knowingly and willfully if he acted voluntarily and purposely and with specific intent to do something which the law forbids. That is to say that he must have acted with evil motive or bad purpose to disobey or to disregard the law, and not because of negligence, mistake, inadvertence or other innocent reason.

The question of whether the defendant Hodas honestly believed that the payments he claims he made to Glass were deductible under the law should be considered by you in deciding whether he acted knowingly and willfully.

I will go into this area in greater detail when I discuss Count Two with you. What I say there should be considered by you in deciding the guilt or innocence of the defendants on this Count One, the conspiracy count.

It is obviously impossible to ascertain or prove directly what a person knew or intended. You cannot look into a person's mind and see what his intentions were or what he knew.

But a careful and intelligent consideration of the facts and circumstances shown by the evidence in any given case, as to the person's actions and statements, enables us to infer with a reasonable degree of certainty and accuracy what his intentions were in doing or not doing certain things, and the state of his knowledge.

Now, as to the formation of a conspiracy, it is not necessary that there be proof that the participants met together and entered into a formal or written agreement, or that they directly stated between themselves what their object or purpose was to be, or the details of the plans, or the means by which the purpose was to be achieved.

Indeed, it would be extraordinary were the members of a conspiracy to set forth all the actual details of their arrangements in a formal and written agreement.

When persons, in fact embark together upon a criminal conspiracy much is often unexpressed, much is left to unwritten understanding. Generally, such a criminal conspiracy is a matter of inference, deduced from the acts and statements of the alleged conspirators.

What the evidence must show in order to establish that a conspiracy existed is that the members in some way or other, positively or tacitly, came to a mutual understanding to violate the law.

In this case, it is claimed that the purpose of the conspiracy was to evade the payment of the proper amount of income tax for East Coast Cinerama Theatre, Inc.

In determining whether or not there was such an unlawful agreement, you may judge the acts and conduct of each of the alleged conspirators as a whole and the reasonable inferences to be drawn from such evidence.

If you satisfy yourselves, beyond a reasonable doubt, that the conspiracy as alleged in the indictment existed, then you must determine as to each defendant whether he knowingly and willfully was an active participant in the unlawful plan, with the intention of furthering its objectives.

Mere knowledge of an illegal act on the part of some defendant or other alleged co-conspirator is not sufficient. Merely acting in a way which incidentally furthers the purpose of a conspiracy, without knowledge that a conspiracy exists, does not make a person a member of the conspiracy.

If a defendant, with knowledge of the specific object and purpose of a plan, intentionally encourages, advises or assists the scheme, for the purpose of furthering it, he thereby becomes a knowing and willful participant -- he thereby becomes a conspirator.

The guilt of a conspirator is not governed by the extent of his participation. It is not required that each of the conspirators participate in, or have knowledge of, all of its operations. He may join at any point in its progress and be held responsible for all that may be or has been done.

In determining whether or not a particular defendant was a member of the conspiracy, you may consider evidence of his own acts, statements and conduct, as well as evidence of the acts, statements and conduct of other alleged co-conspirators, and the reasonable inferences to be drawn from such evidence.

The indictment alleges that the conspiracy commenced on or about August 12, 1968 and continued to May 14, 1969.

The government, however, is not required to prove that the alleged conspiracy existed over the whole course of time set out in the indictment. It is sufficient if you find that anytime within that period, all of the elements of the alleged conspiracy have been proven to your satisfaction beyond a reasonable doubt. The fact that the government may not have proved that the conspiracy was carried on as early as as long as the indictment alleges is not of any importance so far as the elements of the

crime are concerned.

The next element that must be proved on this issue of conspiracy is the requirement of an overt act.

You may not find a defendant guilty of conspiracy unless you are convinced beyond a reasonable doubt that one of the conspirators knowingly committed one of the overt acts charged in the indictment. The government need not prove the commission of all of the overt acts charged in the indictment.

By the term "overt act" is meant any act committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy.

It must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment. The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. It may be as innocent as the act of a man walking across the street or using a telephone.

The overt acts referred to in the indictment are:

One: In or about March 1968, defendants Martin J. Hodas and Herbert J. Levin became officers in East Coast Cinerama Theatre, Inc., New York, New York.

Two: From on or about August 12, 1968 up to

on or about February 28, 1969, in the Southern District of New York, the defendant Herbert J. Levin kept periodic records, to wit: daily books and collection books of monies reflecting the true income of East Coast Cinerama Theatre, Inc.

Three: From on or about August 12, 1968 up to or on or about February 28, 1969, in the Southern District of New York, the defendants Martin J. Hodas and Herbert J. Levin falsely and fraudulently made and caused to be made income sheets and records and data falsely showing the income for the same period of East Coast Cinerama Theatre, Inc.

Four: From on or about August 12, 1968 up to on or about February 28, 1969, the defendants Martin J. Hodas and Herbert J. Levin presented and caused to be presented false and fraudulent income sheets, records, data and day books described in Paragraph 3 herein to Phil Weinper, C.P.A. and Robert Johnson at 233 West 42nd Street, New York, New York.

Five: On or about May 14, 1969, the defendant Martin J. Hodas, as president of East Coast Cinerama Theatre, Inc. signed a United States Corporate Income Tax Return Form 1120.

The fact that a particular defendant is not

named in an overt act is of no importance because once you find that a conspiracy existed and that a defendant on trial was a member of the conspiracy, then he is bound by the acts done and statements made by any other member in furtherance of that conspiracy, even in the absence of such defendant.

Once you have determined that the offense has been established, under the guidelines I have just given you, then the crime of conspiracy is complete as to every person found by you to have been knowingly and willfully a member of the conspiracy.

Furthermore, at this point the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

Count Two is a substantive count. It charges that the defendants unlawfully, willfully and knowingly attempted to evade a large part of the income tax due and owing by East Coast Cinerama Theatre, Inc. for the fiscal year ending February 28, 1969, by filing a false and fraudulent income tax return stating that the taxable income of East Coast was $4,493.41 and that the amount of tax due and owing thereon was $171.78 when, in fact, each defendant knew well that the taxable income for East Coast in that year was in excess of $139,000.00 and the tax due and

owing exceeded $65,000.00.

In order to establish this crime of income tax evasion, the government must establish beyond a reasonable doubt each of the following three elements:

One: That a substantial amount of federal income tax is due and owing by East Coast Cinerama Theatre, Inc. for the fiscal year ended February 28, 1969, over and above the amount shown on the income tax return filed by that corporation.

Two: That the defendants made an attempt to evade or defeat the tax.

Three: That the defendants made the attempt knowingly and willfully.

Now, with respect to the first element of this count, the government must prove that the corporation had taxable income which the defendants failed to report on the corporate tax return, and that had such income been reported, there would have been a substantial tax due and owing to the United States above the tax calculated on his return.

Neither the exact amount of the unreported income nor the exact amount of the tax allegedly due thereon need be proved by the government to a mathematical certainty, nor is it necessary that the government prove all figures

precisely as they are charged in the indictment. The government must demonstrate beyond a reasonable doubt only the attempted evasion of a substantial portion of East Coast's tax liability.

What do I mean by "substantial"? There is no absolute amount or particular percentage I can give you as a criterion. If you find that there is an understatement, you should measure the size of that understatement as against the amount of money involved in the return.

In other words, you may compare the amount of earnings reported by the corporation with the amount that you find by the evidence should have been reported. The unreported amount is the understatement. The amount of the understatement can only be substantial if it is substantial in relation to the other figures involved, and you should consider in this connection all the attendant facts and circumstances in the case.

If you conclude beyond a reasonable doubt that there was due and owing a substantial amount of tax over and above the amount reported on the tax return, then you must go on to consider whether, for fiscal 1969, the defendants made an attempt to evade that tax.

The claim here is that the attempt to evade consisted of filing a false and fraudulent income tax

return. In this connection it is claimed that they gave false information to the accountants in order that such information would be reported to the Internal Revenue Service.

The definitions of false and fraudulent that I gave you with respect to Count 1, the conspiracy count, apply equally as well here.

The third element which the government must prove beyond a reasonable doubt is that the defendants made the attempt to evade knowingly and willfully.

I have already defined for you under the conspiracy count what is meant by knowingly and willfully. Those definitions apply equally as well here. As I told you then, I will further elaborate on this issue here.

Defendants claim the unreported income referred to by the government consisted of monies extorted from Hodas by a man named Glass. Hodas has testified that he believed such payments were deductible and that he did not report them because of fear that if he was called upon to explain the payments to Glass he would endanger his life and that of his son, as well as risk physical injury to his business.

If you find that payments were made to Glass, that does not end the matter because the mere fact that a

payment was made does not entitle the defendants to an acquittal. You must further find that Hodas had an honest belief that such payments were deductible under the tax law. If you make this finding,then you should acquit Hodas and Levin on this count, as well as Count One.

Payments to meet the demands of an extortionist are clearly not deductible under the law. Neither may they be considered as ordinary business expenses or similar to larceny, both of which are deductible.

Extortion is neither theft nor an allowable business expense. Finally, in this regard, neither coercion nor compulsion are excuses for violating the law under the facts as testified to by the defendants.

In determining whether Hodas had such an honest belief that, despite the state of the law, the payments were deductible, you may consider whether the normal transactions of the business were handled in an unusual and circuitous way avoiding the making of records in the usual way, considering the size of the business, whether a double set of books were kept, whether part of the records were purposely concealed either from the accountants or from the Internal Revenue Service, whether the defendants acted in any way which was intended or likely to mislead the authorities in collecting the proper tax, and finally,

Hodas' entire testimony on this trial.

The guilt of a defendant on Count Two may be established without proof that he himself actually did every act constituting the offense. This is so because anyone who knowingly aids, abets, counsels, induces or procures the commission of a crime against the United States is punishable as a principal.

The government claims the defendant Levin is guilty of this charge in Count Two because he aided and abetted the defendant Hodas.

In order for a defendant to aid or abet another to commit a crime, it is necessary that he willfully associate himself in some way with the criminal venture, knowing the essential elements of the offense as I have outlined it for you, that he willfully participate in it as something that he wishes to bring about, that he willfully seek by some action of his to make it succeed.

Mere presence and guilty knowledge on the part of a defendant that a crime is being committed is not sufficient unless you are also convinced beyond a reasonable doubt that the defendant was doing something to forward the crime -- that he was a participant rather than merely a knowing spectator.

Let us turn now to the third count of the

indictment. The defendant Hodas is charged in Count Three with willfully signing a tax return that included a written declaration that the statements made were made under penalty of perjury, while knowing that the return was not true and correct in every material matter. This count deals with false statements, and not with tax evasion.

You must first find beyond a reasonable doubt that defendant Hodas signed the return. I gather that there is no dispute as to this fact.

You must also determine that the return had a declaration that the statements in the return were made under penalty of perjury. Exhibit 1 which is the return signed by Hodas contains such a declaration.

Third, you must determine beyond a reasonable doubt that the signer did not believe the return to be true and correct as to every material matter. The material matter claimed here is that the gross receipts were $86,179, whereas it is claimed that the true amount exceeded $350,000.

By true and correct, I mean accurate and complete. By a material matter, I mean a matter that is of more than insubstantial importance. If the stated gross receipts are generally accurate, then there can be no false statement as to this matter.

However, if you find that there is a significant variation between stated receipts and the true amount of those receipts, then you would find such statement a material matter.

Finally, you must find beyond a reasonable doubt that Hodas acted knowingly and willfully at the time he made and signed the return. I have already fully discussed these terms with you as they apply to this case.

Now, in determining the guilt or innocence of a defendant, you must decide that question solely from the evidence you heard from the witness stand and the exhibits that have been placed before you.

The summations of counsel which you have heard are not to be considered as evidence, but only as arguments to you as to what counsel feel you should find from the evidence.

In determining the issues in this case, it is your recollection of the testimony that is to control and not that of counsel.

If, during the course of the trial, the Court sustained an objection by one counsel to a question asked by the examining counsel, you are to disregard the question and any alleged facts contained in the question, and you

may not speculate as to what the answer would have been.

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence -- such as the testimony of an eyewitness. The other is indirect or circumstantial evidence which is the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

Circumstantial evidence is the proof of facts from which you may reasonably infer a material element of the crime.

Let us take one simple example to illustrate what is meant by circumstantial evidence.

We will assume that when you entered the courthouse this morning the sun was shining brightly outside. It was a clear day and there was no rain. Now, assume that in this courtroom the blinds are drawn and the drapes are drawn, so that you cannot look outside. Assume as you are sitting in this jury box, and despite the fact that it was dry when you entered the building, someone walks in, with an umbrella dripping water, followed in a short time by a person wearing a raincoat which is soaking wet.

If you are asked whether it is raining out, you cannot say that you know it directly of your own

observation. But certainly upon the combination of facts which I have stated to you, even though when you entered the building it was not raining outside, it would be reasonable and logical for you to conclude that it is raining now.

That is about all there is to circumstantial evidence. You may draw such inferences as reason and common sense lead you to draw from facts which you find to have been proven. Great care must be exercised when drawing inferences from circumstances proved in criminal cases, and mere suspicions will not warrant a conviction.

However, no greater degree of certainty is required of circumstantial evidence than is required of direct evidence. It is not on any different or lower plane. The law simply requires that in either case you must be convinced beyond a reasonable doubt of the guilt of a defendant.

In your search for the truth, you must use plain everyday common sense. You must not be governed by sympathy,bias, or prejudice. You have seen the witnesses on the stand and observed their manner of giving testimony. When I refer to witnesses, I, of course, include the defendants who have testified here.

How did the witnesses impress you? Did they

appear to be testifying frankly, candidly, and fairly?

In determining what degree of credit you should give a witness' testimony, you may consider his conduct, his manner of testifying, and his interest in the outcome of the litigation. You should also consider his relationship to the government or to the defendant, his bias or impartiality, and any motive he may have to testify falsely.

It does not necessarily follow, of course, that because a person is interested in the result he is incapable of telling a truthful version of an occurrence.

The defendants have testified in this case. A defendant who wishes to testify is a competent witness; and his testimony is to be judged in the same way as that of any other witness.

If you believe that a witness willfully testified falsely to any material fact, you may disregard his testimony altogether or you may accept that part of his testimony which you believe worthy of credence. What you accept or reject as credible evidence is for you to determine, but you may not go outside the evidence to speculate as to the facts.

The quality of the testimony of the particular witnesses, regardless of who calls them, rather than the

quantity of witnesses, is the test to be used in arriving at your decision.

You should consider a witness' entire testimony, his direct examination, his cross examination, his redirect examination. You should consider the strength or weakness of his recollection in the light of all the testimony and attendant circumstances in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony.

Two or more persons witnessing an incident or a transaction may see or hear it differently. Innocent misrecollection, like failure of recollection, is not an unusual experience.

In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.

There have been several charts introduced into evidence by the government during the course of this trial. These charts are not independent evidence of a defendant's guilt or innocence. They were admitted merely as a summary of the exhibits and testimony and are to be used by you solely as aids in understanding the proof adduced.

The ultimate decision is for you and you alone to make after weighing all of the evidence. To the extent that any of the charts conform to what you determine the underlying facts to be, you may accept them; to the extent they differ, you must reject them.

The defendant Levin has offered evidence of his reputation in the community prior to the indictment in this case, for being truthful, honest, and a man of integrity, and a law abiding citizen.

You should consider this testimony along with all the other evidence in the case in determining his guilt or innocence. Evidence of a defendant's reputation as to those traits of character ordinarily involved in the commission of the crime charged, may of itself give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.

However, evidence of good reputation should not constitute an excuse to acquit the defendant, if after weighing all the evidence, including the evidence of good character, you are convinced beyond a reasonable doubt that the defendant is guilty of a crime charged in the indictment.

You may call for any exhibits which you desire

to use in conjunction with your deliberations. You may call for a reading of any portion of the official transcript of the evidence, or any portion of this charge.

You are instructed that the question of possible punishment of a defendant in the event of conviction is no concern of the jury and should not, in any sense, enter into or influence your deliberations.

The duty of imposing sentence in the event of conviction rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendants solely upon the basis of such evidence.

I have sought to avoid any comments which might suggest that I have personal views on the evidence, or that I have any opinion as to the guilt or innocence of either of the defendants, and you are not to assume that I have any such views or opinion. This charge is given to you solely to instruct you as to the law applicable to this case.

The actions of the judge during the trial in granting or denying motions or in ruling on objections by counsel, or in statements to counsel, or in attempting to clearly set forth the law in these instructions, are not to be taken by you as any indication of any determination

of the issues of fact. These matters, the actions of the Court, relate to procedure and law.

You, the members of the jury, determine the facts.

There are twelve members of this jury, and all of you must agree upon any verdict you reach as to each defendant on any count in the indictment.

This case is obviously an important one to the defendants. It is equally important to the government. I am submitting it to you in complete confidence that you will comply with your oath as jurors and decide the case fairly and impartially, and without fear or favor.

If there are any exceptions, I will take them in the robing room.

nd charge.

(In the robing room.)

MR. KASSNER: Good morning, Judge.

THE COURT: Yes, Mr. Kassner?

MR. KASSNER: Shall I state my exceptions to the charge, your Honor?

THE COURT: Yes.

MR. KASSNER: I except to the charge which indicated and incluced as an overt act that on March 1968 defendants became officers in East Coast.

I further except and object to that charge which states that you must find that Hodas had an honest belief that the payments were deductible on the grounds that he would not have had to declare that income on his income tax return if he had believed that the payments were made to a partner or joint venturer or be it a silent partner or joint venturer of East Coast, to wit, Benny Glass.

I also object to that part of the charge which instructed the juror that extortion payments do not constitute theft nor are allowable business deductions.

Furthermore, I respectfully request an additional charge that if you believe that Benny Glass was a partner or joint venturer of East Coast, any payments made to Benny Glass as such partner or joint venturer need not have been declared by East Coast as income on its income tax

return. I know your Honor ruled in the middle of the trial that he would not give such an instruction.

I am nevertheless asking for it formally on the record.

THE COURT: The evidence doesn't support such a charge.

MR. KASSNER: I know your Honor's position.

THE COURT: The request is denied.

MR.E BENARD: I have no exceptions to the charge other than with respect to the evidence bearing on the good character of Mr. Levin. I except to the portion wherein your Honor stated that evidence of good character could not give rise to a reasonable doubt, or at least that was the implication that I took from it.

THE COURT: Evidence of good character by itself. You take all the evidence in consideration. What I gave is the canned charge.

Anything else?

MR. BENARD: What I am saying is this: Evidence of good character when take in conjunction with all the evidence may give rise to a reasonable doubt when there is no reasonable doubt absent the evidence of good character. That is the charge I am asking for.

THE COURT: Denied.

For the record there are two cases which state that extortion is neither a business expense nor larceny: Bonney v. C.I.R., 247 F. 2d 237 at page 239, and Terminal Equipment Company, CCH Tax Court Decisions, TC Memo, 1955-132.

MR. KASSNER: As long as your Honor cited cases I respectfully refer your Honor to Section 155E of the Internal Revenue Code --

THE COURT: Why didn't you do that before trial?

MR. KASSNER: If it is your Honor's position that the law is hidden from you and I am the only one that can reveal it to you then I have nothing more to say.

THE COURT: That is not my position, Mr. Kassner. You know that. That is not my position.

I want the record to show that back in June Mr. Kassner was given three weeks time to prepare his requests to charge and memorandum of law with the trial date a month away; that on the date that these requests to charge and memorandum of law were due, my chambers received a call asking for an extension to Thursday night or early Friday. The requests to charge were delivered at 4:30 last Friday afternoon and there was no memorandum of law, although the defendant well knew what the defense in this case was going to be.

I might add, I doubt whether the government knew what the defense was going to be, and the Court certainly had no indication of what the defense was going to be.

MR. KASSNER: If your Honor please, for the last fully two months I have been working seven days a week, 18 hours a day on a Court of Appeals brief that had to be in --

THE COURT: Then you have no right to represent this cleint before this court.

MR. KASSNER: I had an associate working on this, and he is the one who was supposed to get it in --

THE COURT: That is no excuse when you have had a case and you have had a conference and you have had a letter giving you a month's notice of trial. You should have a right to get out of the case then. That is your obligation to your client.

MR. KASSNER: I have a right to expect you to charge in conformity with due process.

THE COURT: And I have a right to expect that a lawyer who represents a client, obviously getting paid for it, would advise the Court of what his issue is when the Court can have no possible knowledge of what the defense could be until you open Monday morning.

MR. KASSNER: Well, your Honor was aware of it Monday morning.

THE COURT: Monday morning. Your job is to let me know in advance. That is what the Court of Appeals says in its decisions, Mr. Kassner.

We will go outside and let the jury start to deliberate.

(In open court.)

THE COURT: At this time, Mrs. Bradley and Mrs. Venable, we say goodby. Than, you very much. You do not enter into the deliberations of the jury. If you have anything in the jury assembly room in the back, would you please go get them now and report back to Room 109. Thank you.

(Alternate jurors excused.)

(Marshals sworn.)

THE COURT: Ladies and gentlemen of the jury, please follow the marshals.

(Jury retired at 11:05 a.m.)

THE COURT: I assume, gentlemen, that if any requests are made for exhibits you can agree among yourselves as to what goes in. I gather there were no exceptions to the exhibits that I know of.

MR. LEVITT: No, your Honor, none that I know of.

Your Honor, as a matter of housekeeping, rather than read in a list of all the 3500 material turned over,

I have compiled such a list and just ask that it be marked as Exhibit 3500 for the record.

MR. BENARD: No objection.

THE COURT: Any objection, Mr. Kassner?

MR. KASSNER: No objection, your Honor.

THE COURT: All right.

(Government's Exhibit 3500 was received in evidence.)

THE COURT: I have directed that lunch be brought in for the jury.

I would assume that from the time the marshal brints the lunch back to them you can have one hour thereafter for your own lunch period and the Court will so inform you when the lunch is brought in by the marshals.

(Recess.)

(Note from jury: 11:15 a.m.)

THE COURT: I have a request from the jury which reads as follows:

"List of charges. 2. Evidence submitted."

I am going to send a note back to the jury which will read as follows: "By 'evidence submitted' do you mean the exhibits that were introduced in evidence?" I think they mean the exhibits. I don't think they want the whole testimony read back to them again.

Take it back.

(Pause.)

THE COURT: Yes, the answer is yes. Do we have a clean copy of the indictment?

I have a clean copy here if you want to use it, a second copy.

MR. LEVITT: Yes, your Honor.

(Court Exhibit 1 was marked.)

(Note from jury: 12:30 p.m.)

(Jury present.)

THE COURT: Mrs. Ricks, ladies and gentlemen of the jury, you have sent a communication to the Court which reads as follows:

"We would like to hear the testimony of the Mr. Hodas." Do you want the whole thing read. Both direct and cross?

MRS. RICKS: Yes.

THE COURT: The whole thing? All right, go ahead.

(Testimony read.)

(Note marked Court Exhibit 2.)

(Jury retired at 1:45 p.m.)

THE COURT: I have been informed that the jurors' has been delivered.

We will take a luncheon recess until 2:35.

(Luncheon recess.)

(Jury continued deliberations.)

(5:25 p.m.; jury present.)

THE CLERK: Ladies and gentlemen of the jury, I am about to take a roll call and I would ask that you please answer as your name is called.

(Jury polled and all recorded as being present.)

THE CLERK: Madam Forelady, have you agreed upon a verdict?

THE FORELADY: Yes, we have.

THE CLERK: How do you find the defendant Martin HOdas as to Count 1?

THE FORELADY: Not guilty.

THE CLERK: Count 2?

THE FORELADY: Guilty.

THE CLERK: Count 3?

THE FORELADY: Guilty.

THE CLERK: And do you find the defendant Herbert Levin as to Count 1?

THE FORELADY: Not guilty.

THE CLERK: Count 2?

THE FORELADY: Not guilty.

THE CLERK: Now, ladies and gentlemen of the jury, you say you find the defendant Martin Hodas not guilty as to Count 1, guilty as to Count 2, guilty as to Count 3, and

you further find defendant Herbert Levin not guilty as to Count 1 and not guilty as to Count 2. So say you all?

THE FORELADY: Yes.

THE COURT: Do you wish the jury polled, Mr. Kassner?

MR.KASSNER: No, your Honor.

THE COURT: Miss Ricks, ladies and gentlemen of the jury, you have given very careful attention to the evidence as you heard it during the course of this trial. You have deliberated long on the question and you have done what our American system of justice requires, that is, to carefully evaluate the testimony and determine according to your conscience the guilt or innocence of the parties involved. That is all that we can expect of a jury and we thank you very much.

I am informed you have finished your service and certificates of service will be given to you by the clerk and in due course you will receive your checks.

Thank you very much.

(Jury excused.)

THE COURT: Any motions, Mr. Kassner?

MR. KASSNER: Your Honor, I move that the verdict be set aside as against the weight of the evidence. I move for a judgment of acquittal.

I have no further motions.

THE COURT: Motions are denied.

Sentence will take place on September 9th, Room 36 at 10 a.m. and I wish a presentence report.

Bail will be continued to the day of sentence.

All right, gentlemen.

MR. LEVITT: Thank you, your Honor.

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